United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

882

JOINT APPENDIX

IN THE

United States Court of Appeals

For the District of Columbia Circuit

No. 20,868

NEW YORK FOREIGN FREIGHT FORWARDERS AND BROKERS ASSOCIATION, INC.,

Petitioners,

against

UNITED STATES OF AMERICA AND FEDERAL MARITIME COMMISSION,

Respondents.

On Petition for Review of an Order of the Federal Maritime Commission

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JOINT APPENDIX

Notice of Proposed Rulemaking

FEDERAL MARITIME COMMISSION

[46 CFR PART 510]

DOCKET No. 66-31

PRACTICES OF INDEPENDENT OCEAN FREIGHT FOWARDERS, OCEAN FREIGHT BROKERS, AND OCEANGOING COMMON CARRIERS

Notice of Proposed Rulemaking

Notice is hereby given that pursuant to Section 4 of the Administrative Procedure Act (5 U.S.C. 1003) and Sections 43 and 44 of the Shipping act, 1916 (46 U.S.C. 841a and 841b), the Federal Maritime Commission is considering amending paragraphs (a) of § 510.22; (a), (f), (j) of § 510.23; and (a) and (f) of § 510.24, Title 46 CFR. These proposed amendments are for the purpose of attaining more efficient and effective regulation over the practices of licensed independent ocean freight forwarders. A comprehensive review of actual operating experience pursuant to Federal Maritime Commission regulations prescribed in General Order 4, as amended, indicates that certain rule modifications and/or optional alternatives may be warranted at this time. Accordingly, the following proposed amendments will be considered.

Numerous changes are contemplated in paragraph (a) of Section 510.22 *Oceangoing common carriers and persons shipping for own account.* As proposed to be amended paragraph (a) would read as follows:

> § 510.22 Oceangoing common carriers and persons shipping for own account.
>
> (a) An oceangoing common carrier may perform freight forwarding services without a license only with respect to cargo carried under its own bill of lading, in which case the charge for each forwarding service the carrier is willing to perform shall be

assessed in accordance with the carrier's published tariffs on file with the Commission. Any forwarding service on cargo carried under its own bill of lading which the carrier is willing to perform free of charge, including presentation of executed Shipper's Export Declarations to customs authorities, shall be specified in its tariffs. No licensee may charge or collect compensation in the event he requests the carrier or its agent to perform any of the forwarding services set forth in § 510.2(c) unless no other licensee is willing and able to perform such services.[1]

Paragraph (a) of Section 510.23 *Duties and obligations of licensees,* is proposed to be amended by adding at the end thereof the following new material:

"No licensee may provide freight forwarding services through an unlicensed branch office or other separate establishment without written approval of the Federal Maritime Commission. Such approval may be granted only when it is found that qualified personnel competent to perform complete ocean freight forwarding services are employed in the branch office or other separate establishment. Applications for approval of branch offices or other separate establishment in existence on the date of adoption of this rule must be submitted within three months of such date."

As proposed to be amended paragraph (a) would read as follows:

§ 510.23 Duties and obligations of licensees.

(a) No licensee shall permit his license or name to be used by any person not employed by him for

[1] The last sentence of this paragraph is currently the subject of a rulemaking proceeding in Docket No. 66-2.

the performance of any freight forwarding service. No licensee may provide freight forwarding services through an unlicensed branch office or other separate establishment without written approval of the Federal Maritime Commission. Such approval may be granted only when it is found that qualified personnel competent to perform complete ocean freight forwarding services are employed in the branch office or other separate establishment. Applications for approval of branch offices or other separate establishment in existence on the date of adoption of this rule must be submited within three months of such date.

Paragraph (f) of Section 510.23 is proposed to be amended by the inclusion of a time limit within which a licensee would be required to pay over to carriers freight monies advanced by its principal. As proposed to be amended paragraph (f) would read as follows:

§ 510.23 Duties and obligations of licensees.

* * *

(f) Each licensee shall pay over to the ocean-going common carrier or its agent within five (5) days after the receipt thereof or within three (3) days after the departure of the vessel from each port of loading whichever is later, all sums advanced the licensee by its principal for freight and transportation charges, and shall disburse to other persons when due all sums advanced by its principal for payment of any charges, debts, or obligations in connection with the forwarding transaction, and shall promptly account to its principal for overpayment, adjustments of charges, reductions in rates, insurance refunds, insurance money paid to the forwarder

as a result of claims, proceeds of c.o.d. shipments, drafts, letters of credit and any other sums due such principal.

Paragraph (j) of Section 510.23 is proposed to be amended by adding at the end thereof the following new proviso:

"*Provided, further,* that a licensee who maintains and adheres to a uniform schedule of fees to be charged for arranging insurance and for performing other accessorial services (stated by dollar amount and/or percentage of mark-up) need not state separately the components of the charges for such insurance and for such other accessorial services. A licensee who elects to maintain such schedules must make the current schedule and every superseded schedule available upon request. A licensee shall not assess different fees than those specified in the effective schedules. Such schedules shall be filed with the Federal Maritime Commssion and posted in a conspicuous place in the forwarder's office, and shall be mailed upon request."

As proposed to be amended paragraph (j) of Section 510.23 would read as follows:

§ 510.23 Duties and obligations of licensees.

* * *

(j) Every licensee shall use invoices or other forms of billing which state separately as to each shipment: (1) The actual amount of ocean freight assessed by the oceangoing common carrier; (2) the actual amount of consular fees paid; (3) the insured value, insurance rate, and premium cost of insurance arranged; (4) the charge for each accessorial service performed in connection with the shipment. All

other charges or fees assessed by the licensee for arranging the services enumerated in sub-paragraphs (1), (2), (3), and (4) of this paragraph shall be itemized. Licensees shall not be required to itemize the components of charges with respect to transactions made pursuant to § 510.25: *Provided, however,* That licensees who offer to the public at large to forward small shipments for uniform charges available to all and duly filed with the Federal Maritime Commission, shall not be required to itemize the components of such uniform charges on shipments as to which the charges shall have been stated to the shipper at time of shipment, and accepted by the shipper by payment; but if such licensees procure Marine Insurance to cover such shipments, they must state their total charge for such insurance, inclusive of premiums and placing fees, separately from the aforementioned uniform charge, *Provided, further,* that a licensee who maintains and adheres to a uniform schedule of fees to be charged for arranging insurance and for performing other accessorial services (stated by dollar amount and/or percentage of mark-up) need not state separately the components of the charges for such insurance and for such other accessorial services. A licensee who elects to maintain such schedules must make the current schedule and every superseded schedule available upon request. A licensee shall not assess different fees than those specified in the effective schedules. Such schedules shall be filed with the Federal Maritime Commission and posted in a conspicuous place in the forwarder's office, and shall be mailed upon request.

Paragraph (a) of Section 510.24 *Compensation and freight forwarder certifications,* is proposed to be amended by deleting from the end thereof the language which reads:

"unless such principal's name is disclosed on a 'line copy' of the ocean bill of lading which is maintained in files in the United States of the ocean carrier or its agent."

As proposed to be amended paragraph (a) would read as follows:

§ 510.24 Compensation and freight forwarder certifications.

(a) No oceangoing common carrier shall pay to a licensee, and no licensee shall charge or receive from any such carrier, either directly or indirectly, any compensation or payment of any kind whatsoever, whether called "brokerage", "commission", "fee", or by any other name, in connection with any cargo or shipment wherein the licensee's name appears on the ocean bill of lading as shipper or as agent for an undisclosed principal.

Paragraph (f) of Section 510.24 is proposed to be amended by adding at the end thereof a new sentence reading as follows:

"Every tariff filed pursuant to Section 18(b)(1), Shipping Act, 1916, shall specify the rate or rates of compensation to be paid licensed forwarders certifying in accordance with Rule 510.24 (e) hereof, and the conditions of payment."

As proposed to be amended paragraph (f) would read as follows:

§ 510.24 Compensation and freight forwarder certifications.

* * *

(f) An oceangoing common carrier may compensate a licensee to the extent of the value rendered such carrier in connection with any shipment forwarded on behalf of others when, and only when, such carrier is in possession of a certification in the form prescribed in paragraph (e) of this section. Every tariff filed pursuant to Section 18(b)(1), Shipping Act, 1916, shall specify that rate or rates of compensation to be paid licensed forwarders certifying in accordance with Rule 510.24(e) hereof, and the conditions of payment.

The Commission will receive comments on paragraph (g) of Section 510.5, and paragraph (1) of Section 510.21 which respectively provide:

§ 510.5 Requirements for licensing.

(g) (1) The purpose of this paragraph is to prescribe a temporary bonding rule and establish the form and amount of a surety bond to be filed with the Federal Maritime Commission by applicants for licenses as independent ocean freight forwarders, who on September 19, 1961, were not operating under a registration number issued by the Commission or who were so operating but failed to file an application for license in the prescribed form on or before January 17, 1962. This requirement is not applicable to other ocean freight forwarders.

(2) A rulemaking proceeding will be instituted at a later date for the promulgation of a bond in such form and amount as the Commission may require for industry-wide applicability. All applicants temporarily licensed upon the basis of the bond prescribed herein will be required to comply with any future bonding regulations adopted by the Commission.

(3) No license shall be issued to a person to whom this paragraph is applicable unless such person has

filed with the Commission a surety bond in the amount of $10,000 on Form FMC-59, in the following form:[2]

* * *

§ 510.21 Definitions.

* * *

(1) The term "Beneficial interest" for the purpose of these rules includes, but is not limited to, any lien interest in; right to use, enjoy, profit, benefit, or receive any advantage, either proprietary or financial, from; the whole or any part of a shipment or cargo, arising by financing of the shipment or by operation of law or by agreement, express or implied, provided, however, that any obligation arising in favor of a licensee by reason of advances of out-of-pocket expenses incurred in dispatching of shipments shall not be deemed a beneficial interest.

Interested persons may participate in this rulemaking proceeding by filing with the Secretary, Federal Maritime Commission, Washington, D. C., 20573, within 30 days of the publication of this notice in the Federal Register, an original and 15 copies of their views or arguments pertaining to the proposed amended rules. All suggestions for changes in the text as set out above should be accompanied by drafts of the language thought necessary to accomplish the desired change and should be supported by statements and arguments relating the proposed change to the purposes of Section 44 of the Shipping Act, 1916, (46 U.S.C. 841b).

By order of the Federal Maritime Commission.

THOMAS LISI
Secretary

(SEAL)

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[2] The Commission will not receive comments on the contents of Form FMC-59.

Served
October 19, 1966
Federal Maritime Commission

Final Rules

TITLE 46 — SHIPPING

Chapter IV—Federal Maritime Commission

Subchapter B—Regulations Affecting Maritime Carriers and Related Activities

[General Order 4; Amdt. 10; Docket No. 66-31]

Part 510—Licensing of Independent Ocean Freight Forwarders

Subpart B—Duties and Obligations

On May 6, 1966, the Commission published a notice of proposed rulemaking in the captioned proceeding in the Federal Register [31 F.R. 6792-6793] and invited comments from interested persons. The purpose of this proceeding is the consideration of proposed amendments of paragraphs (a) of § 510.22; (a), (f), and (j) of § 510.23; and (a) and (f) of § 510.24 contained in its General Order 4 regulating licensed independent ocean freight forwarders. The Commission also invited comments on §§ 510.5(g) and 510.21(l) of this order, although it did not propose changes in these rules. Comments on the present rules and proposed amendments were submitted on behalf of carriers, conferences, forwarders, and forwarder associations. Replies to these comments were filed by Hearing Counsel on behalf of the Commission's staff, and several persons filed replies to these replies.

On September 7, 1966, the Commission, pursuant to notice, heard oral argument on the proposed amendments

to sections 510.22(a); 510.23(f); 510.23(j); 510.24(a) and 510.24(f) and on present § 510.21(1). The proposed amendment to § 510.23(a) and present § 510.5(g) were considered without oral argument.

The Commission has carefully considered the comments and arguments on the proposed amendments and the present rules and in light thereof herewith adopts its final amendments. No changes have been made in present §§ 510.5(g) or 510.21(1) at this time for reasons noted below. Comments and arguments not discussed or reflected herein have been considered and found not justified or not material.

The contention was made at oral argument that the Commission is without authority to amend the forwarder rules in a proceeding like the present one in which there has been no showing that forwarders' present practices result in violations of substantive provisions of the Shipping Act, 1916 (the Act). It has further been suggested that our recent decision in Docket 65-5—*Proposed Rule Covering Time Limit on the Filing of Overcharge Claims,* served June 28, 1966, supports this contention. The contention is incorrect. Section 44(c) of the Act requires that "The Commission shall prescribe reasonable rules and regulations to be observed by independent ocean freight forwarders . . .", and this provision has been interpreted by the Court of Appeals for the Second Circuit in *New York Foreign Frgt. F. & B. Ass'n* v. *Federal Maritime Com'n,* 337 F.2d 289, 294, 295 (2d Cir. 1964), *cert. den.* 380 U.S. 910, 914 (1965), in upholding the Commission's prior promulgation of rules regulating the activities of independent ocean freight forwarders, as a "mandate" for the creation of forwarder rules by the Commission. The Court, moreover, in considering the argument that "if a practice sought to be regulated is not contrary to a substantive provision of the 1916 Act, then . . . the regulation is invalid," explicitly stated "we do not agree with this restrictive view of the agency's powers."

Nor does Docket No. 65-5, *supra,* support this restrictive view of our authority. In that proceeding, the Commission decided not to promulgate a rule with respect to certain carriers' practices of refusing to consider claims presented to them after the expiration of time intervals less than the two-year period provided in section 22 of the Act for the bringing of action for reparation before the Commission. The Commission stated that the rule could not be promulgated as the carriers' present practices had not been shown to violate a substantive provision of the Act. It went on to state, however, that "a distinction must be made between a rule of this sort and rules implementing certain statutory provisions, which need no such basis . . ."

Forwarders, forwarder associations, and Waterman Steamship Corporation oppose the amendment to § 510.22(a) which would require that carriers performing any forwarding services on cargo carried under their own bills of lading free of charge specify such services in their tariffs, alleging that the amendment will damage the forwarding industry and increase freight rates.

The sole purpose of the amendment is to insure equal treatment of shippers, it is not to encourage carriers to perform forwarding services or to force them to perform such services free of charge. Carriers generally have not desired to engage in forwarding activities, and there has been no indication in this proceeding that they are now anxious to do so, although carriers occasionally file executed shippers' export declarations with customs' authorities for validation. Generally, large shippers have either their own export departments at the ports from which they ship or they make use of independent forwarders on all shipments and thus will be little affected by the amendment. Small shippers, however, could be disadvantaged if the Commission forced carriers to charge for the services they do perform. On the other hand, we

will not force carriers to perform such services free of charge. Thus, the only alteration we will make in existing practice is to require publication of the particular practice in the appropriate tariff so as to insure that all shippers are apprised of the services offered and may take advantage of them. In short, any carrier who wants to include one or more forwarder services in its line-haul rate may do so and all shippers via that carrier will have an equal opportunity to procure such services.

The first sentence of § 510.22(a), which is unaffected by the amendment, was, as noted at the oral argument, inadvertently omitted when this amendment was first proposed and published. No change is made in this sentence.

The purpose of the amendment to § 510.23(a) is to insure the presence of competent personnel in forwarders' branch offices and separate forwarding establishments. It is also designed to guarantee that the Commission will have regulatory power over agents of non-vessel operating common carriers who perform forwarding services to the same extent that it does over other forwarders and to prevent abuses which occur when an individual purports to be operating a branch office for a licensed forwarder but is, in fact, carrying on a separate forwarding business without a license. It is not intended to require separate licensing of *bona fide* branch offices of licensed forwarders. As so interpreted, it is unopposed by any party in this proceeding.

The purpose of the amendment to § 510.23(f) is to fix a time limit within which sums advanced the licensee by its principal for freight and transportation charges must be paid over to the carrier.

The proposed amendment was opposed by forwarders who argue that the rule works an undue hardship upon forwarders by requiring them "to keep track of the day of receipt for hundreds of shipments a week and issue a multi-

plicity of checks in payment of ocean freight''; that the time limitations of the proposed rule are insufficient; and that the rule is unnecessary in the light of ''Shipper's Credit Agreements''. Suggestions have also been made that the amendment be applied only to individual shipments where the freight due exceeds a certain amount and that the proposed amendment be altered to require pay over within ''business days'' rather than ''calendar days''.

The contention that the amendment will require close track of date of receipt for hundreds of shipments and demand the issuance of a multiplicity of checks is partially incorrect, and even to the extent it is correct is without merit. The amendment allows a forwarder to pay over monies received within seven days after receipt or five days after departure of the vessel, whichever is later. One check could be issued for all monies received as of the time the vessel sails. As far as monies received after the vessel has sailed are concerned, it is to be expected that such can be paid over promptly. Such monies are held in trust for the carriers and the fact that close track must be kept of their date of receipt is necessitated not by the proposed amendment but by the forwarder's fiduciary duty as a ''trustee''.

The purpose of ''Shipper's Credit Agreements'' is to require that a shipper pay over to the ocean carrier the ocean freight due within 15 days after a vessel has sailed or lose his credit status. The extent of the use of such agreements by carriers is uncertain. Moreover, they apply both to situations where shippers have advanced funds to forwarders and where they have not. The credit rule thus cannot be a substitute for the prompt payover rule even if it is widely used.

We can see no reason for a distinction between large and small shipments. The necessity that carriers be paid monies due them and that shippers' funds are delivered for the purpose for which they were intended is the same

in both cases. It is for these two objectives that the change has been made in § 510.23(f). Although insolvencies may be rare, the failure to make prompt payovers has been more common, and for this reason, specific time limits for payover have been set.

It has been brought out, however, that the time limitations of the proposed rule may in some cases be insufficient for clearance of the checks from shippers which are to be used by forwarders for payments to the carriers. But as the term "business days" suggested by several parties in this proceeding to extend the payover period is somewhat ambiguous, the Commission will require payover within seven days after receipt of monies or five days after departure of the vessel, "excluding Saturdays, Sundays and legal holidays".

The purpose of the amendment to § 510.23(j) is to allow licensees maintaining and adhering to uniform fee schedules for arranging for insurance and performing other accessorial services to utilize them and to require such schedules to be filed with the Commission and posted in the forwarder's office. Under the former rule, forwarders were required to state their costs separately and hence disclose their "mark-up" (margin of profit). The amendment provides them with an alternative. Objections have been made to the filing and posting requirements of the amendment. Posting is necessary to insure that fee schedules, if adopted, are adhered to, and filing is necessary in order that shippers have one convenient location in which to inspect these schedules.

The purpose of the amendment to § 510.24(a) is to require disclosure of shippers' names on ocean bills of lading by denying compensation to forwarders who act as agents for undisclosed principals.

Rule 510.24(a), as adopted today, reflects the actual wording originally proposed by the Commission in Docket No. 973, on February 19, 1962. The rule was designed to

enable carriers and the Commission to determine promptly whether direct or indirect rebates were being made to shippers through freight forwarders. In Docket No. 973, as here, contentions were raised by forwarders that valid business reasons exist for not disclosing the name of the actual shipper. None were identified or documented. In Docket No. 973 the original proposal was modified to permit the carrier to pay, and the forwarder to collect, brokerage where the name of the shipper is disclosed on the "line copy" of the bill of lading which is retained by the carrier. In such a case, the Commission could determine whether or not an unlawful rebate has been paid and received only after an individual search. The absence of valid reasons for the true shipper's non-disclosure, coupled with the Commission's positive duty to prevent unlawful rebating authorized by sections 43 and 44(c) of the Act, dictate the adoption of a rule which authorizes the payment and receipt of brokerage only where the identity of the actual shipper is fully disclosed. The purpose of the rule was clearly recognized by a forwarder's representative at oral argument: "one, to see to it people are not in the forwarding business who are shippers and two, to see that people didn't receive compensation who are true shippers." Counsel respect this as a lawful regulatory purpose. In short, the rule adopted today does this with efficiency.

In addition to preventing the payment of illegal rebates to shippers, the rule adopted here would lend a measure of integrity to lawful dual rate contracts. Counsel for one forwarder group acknowledged that there are some instances where a shipper has been able to evade his contractual obligations, but that in such cases the forwarder was "in the middle" and has no responsibility to police dual rate agreements. While this may be true, dual rate contracts are quasi-public contracts which are valid only so long as they have Commission approval. Our action, moreover, releases forwarders from enforcing or policing

dual rate contracts, takes them out of the "middle" as they themselves have stated, and places some degree of contract policing on the Commission itself which is discharged by the adoption of the rule.

The purpose of the amendment to § 510.24(f) is to require the filing of forwarding compensation rates in tariffs filed by conferences and carriers pursuant to section 18(b)(1) of the Act. This amendment is opposed by forwarders and independent carriers which allege that the Commission lacks the statutory authority to promulgate it; that it defeats efforts of independent carriers, who do not publish rates of compensation, to compete successfully with conference carriers, who do; and that it compels payment of brokerage. Various suggestions were also made that only certain minimum rates of compensation or rates on certain cargoes be required to be filed. Only one conference is opposed to the amendment, arguing that the Commission is without authority to regulate forwarding activities of conferences or carriers.

It is plain from a reading of the legislative history of the freight forwarder amendment to the Act, P.L. 87-245 (75 Stat. 523), that the Congress intended that the Commission "oversee the reasonableness of brokerage in the light of services rendered". (House Report No. 1096 to accompany H.R. 2488, 87th Cong., 1st Sess. (1961)). Moreover, the House hearings on the forwarder amendment indicate that the Congress recognized that a requirement that the amount of brokerage appear in a tariff would be a reasonable and proper means of maintaining this surveillance. (See Hearings before the Subcommittee on Merchant Marine of the House Committee on Merchant Marine and Fisheries on H.R. 2488, 87th Cong., 1st Sess., 95-97 (1961)). One matter of concern to the Congress at that time was the problem of the attempts of independent carriers to secure cargo by the payment of excessive brokerage. This practice may not be limited to independent

carriers. In any case, such practice is, as we have had occasion to observe, "a pernicious practice, inimical to the best interest of shipping in our foreign trade and oppressive to the shipper who must eventually bear the loss". *Grace Line, Inc.* v. *Skips A/S Viking Line, et al.*, 7 F.M.C. 432 451 (1962). The amendment will allow us to keep ourselves informed of any possible malpractices with respect to payment of compensation to forwarders, including the practice of paying excessive brokerage. No one is compelled under this amendment to pay brokerage for services not performed nor is it designed to defeat attempts by carriers to compete with one another by paying different levels of brokerage or varying such levels according to the services performed. All the Commission desires is that the levels of compensation be ascertainable and it be in a position to insure that such levels not be unjustly discriminatory, excessive, or otherwise unlawful.

The requirement that the compensation rates be filed pursuant to section 18(b)(1) of the Act is appropriate, inasmuch as that section provides for the filing of all charges "under the control of the carrier or conference of carriers which [are] granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of [transportation] rates." Certainly, the level of compensation paid to forwarders in some wise affects or determines the level of ocean freight charges. Moreover, a rule like the present one is particularly appropriate to accomplish the filing of such rates of compensation as section 18(b)(4) specifically requires that "the Commission shall by regulation prescribe the form and manner in which the tariffs required by this section shall be published and filed. . . ." It should be noted in this regard, however, that the requirement of 18(b)(2) that changes and new or initial rates may only be instituted upon 30 days' notice absent special permission from the Commission does not apply to forwarder compensation rates.

No changes will be made at this time in § 510.5(g), the bonding requirement provision, or § 510.21(1), the definition of "beneficial interest". No change in the former can be made upon our present knowledge, and a change in the latter would require legislation by the Congress. The Commission will consider the appropriateness and need for requesting such legislation.

Therefore, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 1003) and sections 18(b), 43 and 44 of the Shipping Act, 1916 (46 U.S.C. 817b, 841a and 841b), Part 510 of Chapter IV of Title 46 CFR is hereby amended as follows:

1. Section 510.22, *Oceangoing common carriers and persons shipping for own account,* is amended by revising the second sentence of paragraph (a) and by inserting thereafter a new sentence. The affected portion reads as follows:

> An oceangoing common carrier may perform freight forwarding services without a license only with respect to cargo carried under its own bill of lading, in which case the charge(s) for each forwarding service the carrier is willing to perform shall be assessed, in accordance with the carrier's published tariffs on file with the Commission. Any forwarding service on cargo carried under its own bill of lading which the carrier is willing to perform free of charge, including presentation of executed Shipper's Export Declarations to customs authorities, shall be specified in its tariffs.

2. In § 510.23, paragraph (a) is amended by adding three new sentences at the end thereof, paragraph (f) is revised, and paragraph (j) is amended by adding a further

proviso to the end thereof. As amended § 510.23 reads as follows:

§ 510.23 Duties and obligations of licensees.

(a) No licensee shall permit his license or name to be used by any person not employed by him for the performance of any freight forwarding service. No licensee may provide freight forwarding services through an unlicensed branch office or other separate establishment without written approval of the Federal Maritime Commission. Such approval may be granted only when it is found that qualified personnel competent to perform complete ocean freight forwarding services are employed in the branch office or other separate establishment. Applications for approval of branch offices or other separate establishment in existence on the date of adoption of this rule must be submitted within three months of such date.

• • •

(f) Each licensee shall promptly pay over to the oceangoing common carrier or its agent within seven (7) days after the receipt thereof, excluding Saturdays, Sundays and legal holidays, or within five (5) days after the departure of the vessel from each port of loading, excluding Saturdays, Sundays and legal holidays, whichever is later, all sums advanced the licensee by its principal for freight and transportation charges, and shall disburse to other person(s) when due all sums advanced by its principal for the payment of any charges, debts or obligations in connection with the forwarding transaction, and shall promptly account to its principal for overpayments, adjustments of charges, reduc-

tions in rates, insurance refunds, insurance money paid to the forwarder as the result of claims, proceeds of c.o.d. shipments, drafts, letters of credit and any other sums due such principal.

* * *

(j) * * * *Provided Further,* That a licensee who maintains and adheres to a uniform schedule of fees to be charged for arranging insurance and for performing other accessorial services (stated by dollar amount and/or percentage of mark-up) need not state separately the components of the charges for such insurance and for such other accessorial services. A licensee who elects to maintain such schedules must make the current schedule and every superseded schedule available upon request. A licensee shall not assess different fees than those specified in the effective schedules. Such schedules shall be filed with the Federal Maritime Commission and posted in a conspicuous place in the forwarder's office, and shall be mailed upon request.

* * *

3. In § 510.24, paragraph (a) is amended by deleting material from the end thereof and paragraph (f) is amended by adding a new sentence to the end thereof. As amended § 510.24 reads as follows:

§ 510.24 Compensation and freight forwarder certifications.

(a) No oceangoing common carrier shall pay to a licensee, and no licensee shall charge or receive from any such carrier, either directly or indirectly, any compensation or payment of any kind whatsoever, whether called "brokerage", "commission", "fee", or by any other name, in connec-

tion with any cargo or shipment wherein the licensee's name appears on the ocean bill of lading as shipper or as agent for an undisclosed principal.

• • •

(f) An oceangoing common carrier may compensate a licensee to the extent of the value rendered such carrier in connection with any shipment forwarded on behalf of others when, and only when, such carrier is in possession of a certification in the form prescribed in paragraph (e) of this section. Every tariff filed pursuant to section 18(b)(1), Shipping Act, 1916, shall specify the rate or rates of compensation to be paid licensed forwarders certifying in accordance with rule 510.24(e) of this part, and the conditions of payment.

• • •

Effective date: These rules shall become effective 30 days after date of publication of this notice in the Federal Register.

By order of the Commission.[1]

Thomas Lisi
THOMAS LISI
Secretary

(SEAL)

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[1] Chairman Harllee's dissent as to Rule 510.24(a) and Commissioner George H. Hearn's dissent as to Rules 510.22(a), 510.24(f), 510.21(1), and 510.5(g)(3) filed as part of original document.

Final Rules

DOCKET NO. 66-31—CHAIRMAN JOHN HARLLEE DISSENTING IN PART

I dissent to that portion of the majority decision involving the undisclosed principal rule embodied in Section 510.24(a). For the reasons hereinafter stated, it is my view that this particular proposed rule should be made the subject of a separate evidentiary proceeding.

The amendment adopted by the majority encourages the disclosure of shippers' names on ocean bills of lading by denying compensation to any forwarder whose name appears on the bill as shipper or as agent for an undisclosed principal. Although I recognize the importance of the true shipper as a means of enforcing dual rate contracts, there may be other factors, not fully explored in this proceeding, which should also be considered.

Many trades have not adopted a dual rate system, and the argument has been made that the rule should not apply to forwarders serving such trades. Also, there has been some indication that forwarders might effectively evade the purpose of this rule by assessing a charge against the shipper equal to the amount of brokerage lost for the privilege of remaining undisclosed.

Additionally, a review of the comments submitted indicates that there may sometimes exist *bona fide* business reasons, rather than the desire to avoid the obligations of a dual rate contract, for refusing to disclose shippers' names on bills of lading. The majority, however, minimizes the importance of such business reasons and has rejected them.

Certain comments also question the Commission's authority to place further conditions upon the forwarders' right to compensation, in view of the explicit language of the statute in this respect. (Section 44(e), Shipping Act, 1916.)

Final Rules

Because the various suggestions offered both for and against the proposed rule were not fully developed in the instant proceeding, it is difficult on this record to resolve the conflicts and reach a decision on the adoption of this particular rule at this time. It is therefore my view that the proposed rule embodied in Section 510.24(a) should not be approved, but should be made the subject of a new separate evidentiary proceeding.

DOCKET No. 66-31

Commissioner HEARN, dissenting in part:

My decision in this case is that stated in the majority opinion with the exception of the four issues recited below.

The first is rule 510.22 (a) insofar as the rule is relaxed to permit carriers to perform forwarding services free of charge, on the condition that the availability of such free forwarding services are reflected in their ocean freight tariffs. That the recipient of a service of value bear the cost thereof is elemental in regulated industries.[1] *Freight Forwarder Investigation, etc.*, 6 FMB 327 (1961) *Transportation Freight Forwarders—Free or Reduced Rates for Services,* 37 Comp. Gen 601 (1958), and I find, that the distinction which the majority makes in permitting *carriers* to perform free forwarding services while forwarders are proscribed from doing so constitutes a distinction without a difference. In my view, if carriers hold themselves out to perform forwarding functions, they

[1] ". . . [C]osts should reflect the value of all resources required to provide the service." Economic Report of the President, January, 1966.

should charge for those services,[2] and they should assess the charge in accordance with a schedule published and on file with the Commission. Free forwarding, if it is assumed by carriers, will result in a lower total cost to a shipper who by-passes a forwarder than to the shipper who avails himself of the forwarder's services. This Commission and its predecessors, as well as the Congress, have recognized the important role that forwarders play in our ocean commerce. In *Agreements and Practices re Brokerage,* 3 U.S.M.C. 170 (1949), the Commission recognized that "forwarders make a valuable contribution to our foreign trade . . ." and that it "is an integral part of the commerce of the United States." In *Freight Forwarder Investigation—Etc., supra,* the Federal Maritime Board again found the forwarders to render necessary functions in the efficient flow of our commerce. The Congress has made similar observations:

> "It was clear to the Committee that the work of freight forwarding is essential to the movement of goods in foreign commerce under normal conditions."
>
> H. Rpt No 162, 77th Cong., 2d Sess.

In reporting on proposed legislation before the 1951 amendment was enacted a Committee stated:

> "The ocean freight-forwarding industry is a highly important segment of the economy of the United States, in that its functioning makes possible par-

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[2] In an analogous situation the Interstate Commerce Commission has held that the practice of railroads of "loading and unloading carload freight of forwarders at charges which are substantially less than the cost to respondents of performing such services, have the effect of granting unlawful concessions to such forwarders. . . ." *Freight Forwarding Investigation,* 229 I.C.C. 201 (1938).

> ticipation in the Nation's foreign commerce by many industries and businesses . . ."
>
> Rpt. No 691, 87th Cong., 1st Sess., p. 3 (1961).

The rule promulgated by the majority here could have the unhappy effect of doing actual harm to the forwarding industry without giving any real advantage to carriers or to shippers, as a class. In light of the present industry posture, I am of the view that carriers would be better off financially if they were paid for services rendered. The granting of free services would possibly result in preferential treatment of some shippers.

Further, the reason for this amendment to the rule is indeed obscure. No party to the proceeding, including Hearing Counsel, supported it, and I am at a loss to envision any valid purpose to be served by it. The views of Hearing Counsel at oral argument are indeed persuasive. As he pointed out, testimony of carrier representatives, at hearings on the Forwarder legislation in 1961, indicated that they did not relish the idea of going into the forwarding business and that such an undertaking would require experienced personnel and additional overhead expenses. It is precisely this added cost feature, without compensation therefor, that leads me to the conclusion that the amendment not only serves no regulatory purpose, but opens the door to possible carrier rebating.

The New York Association, moreover, a party to this proceeding, argued in *New York Foreign Frgt. F. & B. Ass'n* v. *Federal Maritime Commission,* 337 F.2d 289 (1964), that they should have been permitted to collect compensation from a carrier when the carrier performed free forwarding services for them in light of "the absence of specific statutory language prohibiting the rendering of free services by carriers." The Court explicitly rejected this argument stating ". . . this narrow approach

ignores the Commission's responsibility to enforce the broad objectives" of the Shipping Act.

Secondly, I believe the amendment to 510.24 (f), whereby ocean carriers and conferences of carriers will be required to include in their filed tariffs the rate or rates of compensation that they pay to forwarders, is an unwarranted restrictions upon the freedom of independent carriers to attract cargoes. The adoption of the proposal would certainly obviate the temptation that might confront a forwarder where an independent carrier anticipates a "light" lifting and offers increased "brokerage" or compensation to the forwarder for cargo, in which case the forwarder might substitute his own interests for those of his shipper client.

While the Commission in 1962[3] did point out that the payment of "excessive brokerage . . . is a pernicious practice," there is nothing in this record to authorize the Commission to lend its *imprimatur* to one level of brokerage and declare another anathema. In instances where brokerage has been denied, or pegged at less than 1¼ percent of the ocean freight, by *concerted* action, it has been repeatedly condemned,[4] and the Congress has indicated that brokerage of 1¼ percent should be regarded as a "floor."[5]

Furthermore, there is not in this record, nor has there been established in any record of events since General Order 4 became effective December 22, 1961, a single instance of a forwarder dealing with cargo committed to his

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[3] *Grace Line Inc.* v. *Skips A/S Viking Line et al.*, 7 F.M.C. 432 (1962).

[4] *Agreements and Practices Re Brokerage*, 3 supra; *Pacific Coast European Conf.—Payment of Brokerage*, 5 F.M.B. 225 (1957).

[5] "It is not the intent of this committee that the clause to 'the extent of the value rendered' should act as a diminution of the historical 1¼ percent as brokerage." H. Rpt. No. 1096, 87th Cong., 1st Sess., p. 3 (1961).

care by a shipper in a fashion advantageous to the forwarder and detrimental to the shipper. Also, the rule would restrict the ability of independents to legitimately compete for cargoes. It may well be that our action today in requiring the identity of the shipper to be disclosed on the bill of lading as a condition to the collection by the forwarder of brokerage will enhance the integrity of dual rate contracts, and will redound, indirectly, to the benefit of conference carriers. Consequently, the amendment to rule 510.24(f) adopted by the majority today, will leave little inducement for forwarders to patronize independents, contrary to the explicit recommendation of the Celler Committee that:

> "The maritime agencies should use their general regulatory powers to encourage to the fullest extent possible the operation of independent operators. . . ."
>
> H. Rpt. No. 1419, 87th Cong., 2d Sess., p. 396 (1962).

In addition, the amendment would clearly stifle the inducement of a forwarder to provide "spot" cargoes for a carrier whereby the forwarder actually undertakes solicitation functions on the carrier's behalf, and concerning which there were some instances in *Freight Forwarder Investigation—Etc., supra.* On balance, I believe this amendment will work to the detriment of carriers, forwarders and the shipping public.

The third matter I wish to address myself to is the so-called Beneficial Interest Rule—rule 510.21 (1), which, I believe, involved a misunderstanding or misconstruction of Section 44 of the Act when it was adopted in 1963. By way of background, Section 1 of the Shipping Act, as amended in 1961, excluded from the definition of an "independent freight forwarder" a shipper and one who "has

any beneficial interest" in a shipment. In December 1961, when the Commission promulgated General Order 4, implementing the 1961 Freight Forwarding amendment to the Act, if defined "independent ocean freight forwarder" precisely as that entity is described in the Act and as I have paraphrased above. In February 1962, the Commission proposed substantial amendments to General Order 4. The originally proposed rules, oddly, made but one reference to the term "beneficial interest." It was not mentioned in the definitions section (Section 510.21), but was included in Section 510.23; the section dealing with the duties and obligations of licensees:

> "(c) no licensee shall share, directly or indirectly any compensation or freight forwarding fee with a shipper . . . nor with any person or persons having a beneficial interest in the shipment."

On February 26, 1962, subsection (m) was added to section 510.21, as a proposed rule in substantially the form that it appears today as section 510.21(l).

After comments were received, the proposed rules were further modified in January 1963, and the beneficial interest rule was stated precisely as it exists today.

Along with other rules, the legality of the beneficial interest rule was unsuccessfully challenged *New York Foreign Frgt. F & B Ass'n* v. *Federal Maritime Commission, supra.* The problem which the Court faced was whether, in defining "beneficial interest," the Commission erred in including within that term the phrase "any lien interest . . . arising by the financing of the shipment." The Court found this rule to be a reasonable one in preventing a "forwarder from selling goods under the guise of 'financing' and then using this subterfuge to receive a discounted freight rate."

Certainly, the statute insists that forwarders be truly independent of shippers. But we have the question before us now whether it is necessary, in order to keep forwarders "truly independent of shippers" and not have any beneficial interests in the shipments in order to prevent illegal rebating, to include within the term "beneficial interest" a lien interest in the cargo as protection for freight monies advanced by the forwarder. I think that it is not.

First of all, the term "beneficial interest" is one of art. *Black's Law Dictionary,* 4th Ed., 1951, defines it as "Profit, benefit, or advantage resulting from a contract, or the ownership of an estate as distinct from legal ownership or control." *Ballentine's Law Dictionary,* 1948 edition, defines a beneficial interest in property as "a right to its enjoyment . . . where the legal title is in one person and the right to such beneficial use or interest is in another, and where such right is recognized by law, and can be enforced by the courts, at the suit of such owner . . ." In *Montana Catholic Missions* v. *Missoula County,* 26 S. Ct. 197, 200 (1906), the Court said:

> "The expression beneficial use or beneficial ownership or interest in property is quite frequent in the law and means in this connection, such a right to its enjoyment as exists where the legal title is in one person and the right to such beneficial or interest is in another . . ."

Again, the phrase was interpreted in *In Re Duffy's Estate,* 292 N. W. 165 (1940) as follows:

> " 'Beneficial Interest' is one of value, worth, advantage, or use to a person."

These definitions are hardly co-extensive with the judicially accepted definitions of a lien. *Black* defines a lien

as "A charge or security or encumbrance upon property." *Bouvier*[6] defines a lien as "A hold or claim which one person has upon the property of another as security for some debt or charge." *Ballentine's* definition is to the same end: ". . . a charge upon property for the payment or discharge of a debt or duty . . ." Such clear distinctions between a beneficial interest on the one hand, and a lien interest on the other hand, constrain us from either confusing them or from resorting to secondary aids—of which legislative history is but one—to determine the meaning of the term "beneficial interest." As noted, I think the term has been confused and misunderstood. The term "is plain and admits of no more than one meaning," hence "the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion." *Caminetti* v. *United States,* 242 U. S. 470 (1916) *Packard Motor Co.* v. *National Labor Relations Board,* 330 U. S. 485 (1947). In any event, the aim of Section 44, as is relevant here, is to avoid the comingling of the interests of forwarder and shipper with respect to the carrier so that rebating would be obviated. I believe that this evil can be avoided, and that our export posture can be enhanced by a rule of reason on the beneficial interest point short of Congressional action.[7] In *California* v. *United States,* 320 U. S. 577 (1944) Justice Frankfurter observed:

> "Finding a wrong which it is duty bound to remedy the Maritime Commission, as the expert body established by Congress for safeguarding this spe-

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[6] Bouvier's Law Dictionary, 1914 edition.

[7] While the majority has announced that it "will consider the appropriateness and need" for such legislation, it is my view that we can act now. I believe that the "appropriateness" for a beneficial interest rule which excludes lien interests has been demonstrated but that the "need" for legislation on this point, except as a clarification of our present authority, is unnecessary.

> cialized aspect of the national interest, may, within the general framework of the Shipping Act, fashion the tools for so doing."

A corallary to that injunction, in the context of freight forwarding, requires the Commission to wipe away needless and unwarranted impediments to the flow of our export commerce. One of the parties to this proceeding indicated that the rule cost his firm some 25 to 30 accounts, covering about five to ten shipments each month involving "forwarding fees" from $10 to $15 per shipment. One can only estimate roughly the loss of exports due to the operation of this rule, but taking the low figures, it resulted in a loss of five shipments per month. This is not to say, of course, that every forwarder could increase his exports by five shipments per month if he could undertake financing—most forwarders are not in this position—but at a time when United States exporters are hard pressed to compete in foreign markets, it seems to me that our "beneficial interest" rule is actually working at cross purposes with our national export policy. I am of the firm belief that the beneficial interest rule could be written in such a way that purposeful implementation could be given to the Forwarding amendment to the Shipping Act and the Commission could, in a positive way, give meaningful assistance to our national undertaking to increase exports. Therefore, I would strike from section 510.21 (1) the phrase "any lien interest in," and to insure that lien interests do not become the vehicle for rebates, I would add to section 510.23—duties and obligations of licensees—the following subsection:

> "(m) A licensee may advance ocean freight monies on behalf of a shipper for a period not exceeding ninety (90) days from the date of discharge of the cargo at the port of destination. The

charge assessed by the licensee shall be a bona fide financing fee and shall not exceed one (1) percent per month of the invoice price of the shipment (of the ocean freight advanced). In the event that a licensee who has financed a shipment becomes the owner thereof by reason of the exercise of a lien, the licensee shall within ten (10) days report such fact to the Commission in writing, and shall return to the carrier any compensation in connection with such shipment received pursuant to section 510.24, and shall report such fact to the Commission in writing within twenty (20) days."

I am of the firm belief that in this way, the Congressional mandate of separation of forwarder and shipper functions will be honored, and that forwarders will be given an incentive to lend their recognized talents to the development of our export waterborne commerce.

Finally, I would modify section 510.5 (g) (3) to require a surety bond of a licensee in the amount of $25,000. This amount will give shippers some added protection in the event of default by a forwarder but will only increase the forwarding cots of a bond by less than $200 per year, a minor cost of doing business but a substantial protection to the shipping public.

Order on Petitions for Reconsideration

TITLE 46—SHIPPING

CHAPTER IV—FEDERAL MARITIME COMMISSION

[Docket No. 66-31]

PART 510—LICENSING OF INDEPENDENT OCEAN FREIGHT FORWARDERS

Effective Date of Amendments

On October 22, 1966, the Commission published an order in the FEDERAL REGISTER adopting amendments to General Order 4, 46 CFR Part 510, regulating licensed independent ocean freight forwarders. The rules were to be effective 30 days from the date of publication.

On November 14, 1966, a petition for reconsideration and application for postponement of effective date was filed by New York Foreign Freight Forwarders & Brokers Association, Inc. This petition was directed to the rules contained in §§ 510.22(a), 510.23(f), 510.24(a) and (f), and 510.21(l).

Good cause appearing, the Commission on November 18, 1966, postponed the effective date of amendments of §§ 510.22(a), 510.23(f), 510.24(a), and 510.24(f) until further order.

National Customs Brokers & Forwarders Association of America and National Association of Secondary Material Industries (not heretofore a party to the proceeding) have also petitioned for reconsideration of certain of the rules. Far East Conference, United States Atlantic and Gulf/Australia-New Zealand Conference, 21 conferences and their member lines represented by the firm of Casey, Lane & Mittendorf, and Hearing Counsel have replied.

The New York Association asks us to reconsider whether we have authority to promulgate the rules in question here. Our report specifically discussed and rejected each point

raised by the New York Association concerning our authority. There is no need to reiterate such discussion here. We need only say that sections 43 and 44 of the Shipping Act, 1916, contain authority for the promulgation of these rules.

Reconsideration of the amendment to § 510.22(a) is requested. This amendment would permit ocean carriers to perform free forwarding services to the extent they so specify in their tariffs. Reconsideration is requested in light of our predecessor's decision in Docket No. 765, Freight Forwarder Investigation, Etc., 6 F.M.B. 327, in which the Board found that performance of free forwarding services by common carriers constituted a violation of section 16 of the Act. This finding, however, when considered in light of the circumstances in Docket 765, will not preclude the adoption of this amendment. The practice condemned in Docket 765 involved the performance by carriers of free forwarding services for New York forwarders at certain outports, while refusing to perform similar free forwarding services for the outport forwarders. Such practices resulted in loss of revenue by and discrimination against outport forwarders.

What was condemned in Docket 765 was the practice of affording some persons transportation services at less than established rates. Such a result cannot occur under this amendment. This amendment permits free forwarding services by a carrier only to the extent such free services are established by tariff and are made available on an equal basis to all.

The only reason offered for reconsideration of the amendment to § 510.23(f) is that we lack authority to issue the rule. As stated above, sections 43 and 44 of the Act contain the proper authority.

Reconsideration is requested of the amendment to section 510.24(a) which would require disclosure of the shipper's name on the bill of lading. It is stated that the

former rule which required such disclosure on the "line copy" only was sufficient to prevent rebating; a declared purpose of the amendment. It is also suggested that if the purpose of the rule is to facilitate enforcement of dual rate contracts it is improper to attempt to do so through such an unrelated proceeding. The petitions for reconsideration contain nothing to cause us to reconsider this amendment. The best way to prevent unlawful rebating is to discourage secrecy and this amendment will be of great assistance in that respect. This Commission is charged with the duty of policing dual rate contracts and this rule will enable us to better perform that duty. An evidentiary hearing on this matter is requested but it has not been shown what might be gained by such a hearing.

Reconsideration is requested of the amendment to § 510.24(f) which would require carriers to include in their tariffs, the rate of compensation to be paid to forwarders. It is suggested that we erred in concluding that section 18 of the Act confers authority to require such information in a carrier's tariff.

The legislative history of the forwarder legislation indicates that Congress intended the Commission to closely scrutinize the payment of compensation. This amendment would accomplish that purpose.

We are also asked to reconsider our decision that any amendment to § 510.21(l), which defines "beneficial interest," would require legislation by Congress. It is suggested that the "beneficial interest" rule be amended to allow a forwarder to have a lien interest in a shipment. The statute and legislative history bar the adoption of such a rule. Congress in drafting the forwarder legislation specifically deleted a phrase from the definition of "independent ocean freight forwarder" which would have allowed a forwarder to have a lien interest in a shipment. We are bound by that decision.

Order on Petitions for Reconsideration

In view of the foregoing it is ordered:

1. That the petitions for reconsideration are hereby denied.

2. That the amendments to §§ 510.22 (a), 510.23(f), 510.24(a) and (f) of Title 46 CFR, published in the FEDERAL REGISTER of October 22, 1966 (31 F.R. 13650), shall become effective 30 days from the date of publication of this order in the FEDERAL REGISTER.

By the Commission.

[SEAL]

THOMAS LISI,
Secretary.

Petition for Review

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

Docket No. 20,868

NEW YORK FOREIGN FREIGHT FORWARDERS AND BROKERS ASSOCIATION, INC.,

Petitioner,

against

UNITED STATES OF AMERICA AND FEDERAL MARITIME COMMISSION,

Respondent.

To: The Honorable United States Court of Appeals for the District of Columbia

The petitioner, New York Foreign Freight Forwarders and Brokers Association, Inc., for its petition for review respectfully alleges:

(1) That this is a petition for review of an order of the Federal Maritime Commission, hereinafter referred to as the "Commission", said order arising from a rulemaking proceeding designated as Docket No. 66-31, General Order 4, Amendment 10 (31 F.R. 13650). A copy of the order and the rules promulgated thereunder are attached hereto and marked Exhibit "A" and made a part hereof. The effective date of the amendments to §§ 510.22(a), 510.23(f), 510.24(a) and 510.24(f) contained in the aforesaid order was postponed by order of the Commission, dated November 18, 1966, pending disposition by the Commission of a petition for reconsideration filed by petitioner herein. By order, dated March 2, 1967, a copy of

which is attached hereto as Exhibit "B", the aforesaid petition for reconsideration was denied and the Commission ordered that the amendments to §§ 510.22(a), 510.23(f), 510.24(a) and 510.24(f) become effective 30 days from the date of publication in the Federal Register. The aforesaid order of denial was published in the Federal Register on March 7, 1967 (32 F.R. 374) and the said amendments will become effective on April 5, 1967.

(2) That your petitioner is a membership corporation organized under the laws of the State of New York with its principal office in the City of New York and has approximately 130 members engaged in business in the City of New York and in other major ports of the United States as ocean freight forwarders. The members of the Association are licensed to do business by the Commission pursuant to the provisions of the Shipping Act, 1916 (46 U.S.C. § 801 et seq.). The Association and its members are aggrieved by the aforesaid orders of the Commission, Exhibits "A" and "B" hereto.

(3) That the decision and order of the Commission are reviewable under 5 U.S.C. § 1031 et seq. (the Judicial Review Act of 1950) and 5 U.S.C. § 1001 et seq. (the Administrative Procedure Act). This Court has jurisdiction under 5 U.S.C. § 1032 and 5 U.S.C. § 1009 and venue under 5 U.S.C. § 1033. The Commission and the United States of America are named as respondents under Rule 38(a) of this Court.

(4) That Docket 66-31, General Order 4, Amendment 10, Subpart B was initiated by the Promulgation of a notice of proposed rulemaking in the Federal Register of May 6, 1966. The Association as an interested person on its own behalf as well as on behalf of its members submitted comments in the said docket to the Commission and participated in the oral argument before the Commission on the proposed rules.

(5) That the Commission's order amending §§ 510.22(a), 510.23(f), 510.24(a) and 510.24(f) is invalid and unlawful for the following reasons:

(a) it has been promulgated by the Commission in excess of its statutory jurisdiction, authority or limitations;

(b) it is contrary to constitutional right, power, privilege or immunity;

(c) it is arbitrary, capricious, and an abuse of discretion, unsupported by substantial evidence and otherwise not in accordance with law.

WHEREFORE, petitioner prays this Honorable Court make and enter an order:

(a) declaring the said order of October 22, 1966 to be invalid and unlawful insofar as it applies to the amendments to §§ 510.22(a), 510.23(f), 510.24(a) and 510.24(f) General Order 4, Subpart B;

(b) vacating and enjoining the enforcement of the said order with respect to the aforesaid amendments and remanding same to the Commission;

(c) granting an interlocutory injunction against the enforcement of the aforesaid order insofar as it applies to the aforesaid amendments.

Dated: New York, N. Y.
March 23, 1967

Respectfully submitted,

GERALD H. ULLMAN,
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120 Broadway,
New York, N. Y. 10005
WOrth 2-6967.

Petitions to Intervene

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

[SAME TITLE]

MOTION TO INTERVENE BY NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC.

The National Customs Brokers and Forwarders Association of America, Inc. (hereinafter "Intervenor"), hereby moves to intervene in this proceeding.

The Petition for Review in this proceeding seeks to review and set aside a final order of the Federal Maritime Commission dated October 19, 1966, amending Sections 510.22(a), 510.23(f), 510.24(a) and 510.24(f) of Title 46 CFR, published in the Federal Register of October 22, 1966 (31 F.R. 13650). An Order of the Commission dated March 2, 1967, denying petitions to review the order of October 19, 1966, was published in the Federal Register of March 7, 1967 (32 F.R. 3774).

Intervenor was one of the parties in interest in the Commission proceeding below and its interests will be affected if the said order of the Federal Maritime Commission is not set aside.

Section 8 of the Administrative Orders Review Act of 1950 (5 U.S.C. § 1038, 64 Stat. 1131) providing for judicial review in the court of appeals of orders of the Federal Maritime Commission provides that:

> "any party or parties in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be repre-

sented by counsel in any proceeding to review such order."

Since the Petition for Review requests that this court set aside rules regulating the freight forwarding industry and since Intervenor is a New York membership corporation having as members many persons engaged in the freight forwarding industry, the interests of Intervenor will be affected if this court does not enjoin, set aside, or suspend the order of the Federal Maritime Commission at issue in this proceeding. Therefore, Intervenor is entitled to appear as a party in this proceeding and to be represented by counsel.

WHEREFORE, pursuant to Rule 38(f) of the rules of this court, Intervenor respectfully requests that an order be issued permitting it to intervene, with full rights accorded any other party.

Dated: New York, N. Y.
March 31, 1967

Respectfully submitted,

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Of Counsel

Motion to Appear as Parties

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

[SAME TITLE]

This motion to appear as parties is submitted pursuant to the provisions of Section 8 of the Review Act, 5 U.S.C.A. § 1038, on behalf of 21 steamship conferences and 73 steamship lines, members of one or more of the conferences. These conferences which operate under agreements approved by the Federal Maritime Commission ("Commission") are referred to hereinafter collectively as "Conferences". They serve the trades between the United States and: Central and South American, and Caribbean ports;* Brazil, Uruguay, Paraguay, and Argentina;** Danish, Finnish, Norwegian, Polish, Swedish, German Baltic, Icelandic, Belgian, Dutch, German, French Atlantic ports, and Union of Soviet Socialist Republic ports served by the Baltic;*** all ports on the Mediterranean Sea (except Spanish and Israeli ports), the Sea of Marmara, the Black Sea, and on the Atlantic Coast of Morocco;† and the United Kingdom and Erie.‡

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* Associated Latin American Freight Conferences, Charles D. Marshall, Chairman.

** River Plate & Brazil Conferences, Wilbur Van Emburgh, Chairman.

*** North Atlantic Continental, Baltic Freight, and French Atlantic Conferences, Charles J. Moran, Administrative Chairman.

† North Atlantic Mediterranean Conference, David M. McNeil, Chairman.

‡ North Atlantic United Kingdom Freight Conference, Richard J. Gage, Chairman.

Motion to Appear as Parties

PARTICIPATION BEFORE AGENCY

The Conferences participated at each stage of the proceeding entitled Docket 66-31 before the Commission. On June 6, 1966, they submitted comments in connection with the then proposed amendments which were published by the Commission in the Federal Register of May 6, 1966 (31 FR 6792). Thereafter, the Conferences participated at all subsequent stages of the proceeding, including the oral argument held by the Commission on September 7, 1966. When petitioners in this Court, the New York Foreign Freight Forwarders ("Forwarders"), sought reconsideration of the Commission's order of October 19, 1966, attached to the Petition for Review as Exhibit "A", the Conferences replied on November 22, 1966. After the Commission denied petitions for reconsideration in the order dated March 2, 1967, attached to the Petition for Review as Exhibit "B", the Conferences notified their member lines of the imminent applicability of the amended rules. When the Conferences learned for the first time on Thursday, March 30, that a Petition for Review of the Commission's order and a petition for interlocutory injunction of the same had been filed, they instructed counsel to appear as expeditiously as possible in support of the Commission and the United States of America.

STATEMENT OF INTEREST

The Conferences have been concerned at all stages before the Commission with 3 of the 4 amendments to General Order 4, Subpart B, on which petitioner seeks review and an interlocutory injunction. The Conferences are concerned with the amendments to § 510.23(f), the "payover rule", § 510.24(a), the "undisclosed principal rule", and § 510.24(f), the "disclosure of the amount of brokerage rule".

Motion to Appear as Parties

SECTION 510.23(f)

The Conferences and their 73 member lines have daily working relationship with members of the forwarders group.

The forwarders daily receive tens of thousands of dollars belonging to the carriers from shippers for freight money earned which many forwarders have held for long periods of time depriving carriers of working capital. Unless the amendment to 510.23(f) is allowed to become effective immediately, this abuse will continue.

SECTION 510.24(a)

The Conferences and member lines have been concerned about the possible rebating practices of the forwarders and the use of the forwarders as screens by certain shippers in carrying out discriminatory practices. The Conferences and member lines fear that unless the amendment to Section 510.24(a) becomes effective on April 20, there will continue to be serious possibilities of rebating and a continuation of contract violations by unscrupulous shippers aided by forwarders. Such contract violations deprive Conference carriers of substantial freight revenues to which they are entitled.

SECTION 510.24(f)

Finally, the Conferences and member lines are concerned that unless the amendment to Section 510.24(f) becomes effective, that carriers will continue to pay exorbitant sums in brokerage compensation to favored forwarders solely to influence the routing of cargo.

For all these reasons the Conferences submit that the three amendments enumerated above originally proposed by the Commission on May 6, 1966, as modified through

the rule making proceeding, Docket 66-31, are of vital importance to the steamship industry. They believe that an interlocutory injunction would bring further damage to the steamship industry and that after this Court has reviewed the forwarders' petition it will uphold the Commission *in toto*. The forwarders have no reasonable chance of succeeding ultimately in their Petition for Review.

WHEREFORE, the Conferences respectfully request they be permitted to appear as parties in support of the respondents, the United States of America and the Federal Maritime Commission, to oppose petitioner's motion for an interlocutory injunction, to submit affidavits and a memorandum of law in opposition, and to participate in oral argument.

Dated: New York, New York
April 2, 1967

Respectfully submitted,

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EDMUND C. SMITH
Attorneys for the various
Conferences and Member Lines

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Motion of the Far East Conference Pursuant to Rule 31 of the General Rules of This Court for Leave to Intervene as a Matter of Statutory Right

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

[SAME TITLE]

The Far East Conference, by its attorney, Elkan Turk, Jr., hereby moves this Court for an order granting to it leave to intervene in the above entitled case.

REASONS WHY THE MOTION SHOULD BE GRANTED

The Far East Conference ("FEC") is a steamship conference of common carriers by water who, pursuant to Federal Maritime Commission Agreement No. 17, as amended, and duly approved pursuant to § 15 of the Shipping Act, 1916, as amended (46 U.S.C. § 814), establish the tariffs of rates which they will charge in the trades from Atlantic & Gulf ports of the United States to various destinations in the Far East. In response to notice published in the Federal Register, 31 F.R. 6792 (May 6, 1966), FEC, by its counsel, filed with the Federal Maritime Commission written comments on the Commission's proposed amendments to its regulations covering the licensing and business practices of ocean freight forwarders, 46 C.F.R. part 510. The rule-making proceeding was designated F.M.C. Docket 66-31. By the filing of said comments and by participation in the oral argument on the proposed amendments of the Rules and the comments received with respect thereto, FEC became a party or parties in interest

in the proceeding before the agency whose interest will be affected if an order of the agency is, or is not, enjoined, set aside, or suspended, within the meaning of the statute applicable to judicial review of Federal Maritime Commission orders, 28 U.S.C. § 2348.

The Commission published (32 F.R. 3774 (March 7, 1967)) an order following reconsideration of the Rules on the petition of the New York Foreign Freight Forwarders & Brokers Association, Inc., that the amendments to 46 C.F.R. §§ 510.22(a), 510.23(f), 510.24(a) and (f), should become effective thirty days after the date of publication. On or about March 28, 1967, the attorney for the New York Foreign Freight Forwarders & Brokers Association, Inc., served upon the attorney for FEC a copy of its petition to this Court for review of the Commission's order amending the aforementioned portion of 46 C.F.R. part 510. The Commission voluntarily deferred until April 20, 1967, the effective date of said portion of the Rules. The undersigned is informed that on April 13, 1967, a hearing was held on the Association's application for an interlocutory injunction against the enforcement of said portion of the Rules and that the application was granted in part and denied in part.

The member carriers of FEC and their competitors pay compensation to ocean freight forwarders and the members of FEC receive a substantial number of the payments of freight for transportation performed by them from ocean freight forwarders acting as the representatives of the shippers of the cargoes. Accordingly, the conference and its members have a vital interest in 46 C.F.R. § 510.22(a), which deals with the circumstances under which common carriers by water may perform freight forwarding services without a license and with the charges to be made therefor; § 510.23(f), which specifies the periods within which licensed ocean freight forwarders must pay over

to common carriers by water sums advanced to the licensee by its principal for freight and transportation charges; § 510.24(a), which specifies the form of ocean documentation prerequisite to payment of compensation to licensed ocean freight forwarders; and § 510.24(f), which requires common carriers by water and conferences thereof to specify in their tariffs filed with the Commission the rate or rates of compensation to be paid to licensed ocean freight forwarders and the conditions of payment.

FEC supported the Commission's abovementioned amendments before the Commission and seeks leave to intervene in support thereof in this review proceeding and in opposition to any injunction, interlocutory or permanent, against the enforcement thereof. Such intervention appears to be a matter of right under 28 U.S.C. § 2348. Accordingly, this motion is made pursuant to Rule 31 of the General Rules of this Court, rather than Rule 38(f), which appears to apply only in administrative review cases in which there is no statutory provision for intervention.

Respectfully submitted,

ELKAN TURK, JR.,
Attorney for the Movant,
Far East Conference,
25 Broadway,
New York, N. Y. 10004.

Dated: New York, N. Y.,
April 14, 1967.

Orders of Intervention

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1966

[SAME TITLE]

Before:

BASTIAN, *Senior Circuit Judge;* and TAMM and ROBINSON, *Circuit Judges,* in Chambers.

ORDER

On consideration of the motions of National Customs Brokers and Forwarders Association of America, Inc., Associated Latin American Freight Conferences, River Plate & Brazil Conferences, North Atlantic Baltic Freight Conference, North Atlantic Continental Freight Conference, North Atlantic French Atlantic Freight Conference, North Atlantic United Kingdom Freight Conference and North Atlantic Mediterranean Freight Conference, for leave to intervene, and it appearing that said movants have lodged with the Clerk pleadings in response to the motion for interlocutory injunction in this case, it is

ORDERED by the court that the aforesaid motions for leave to intervene be granted; National Customs Brokers and Forwarders Association of America, Inc., Associated

Latin American Freight Conferences, River Plate & Brazil Conferences, North Atlantic Baltic Freight Conference, North Atlantic Continental Freight Conference, North Atlantic French Atlantic Freight Conference, North Atlantic Mediterranean Freight Conference and North Atlantic United Kingdom Freight Conference, are allowed to intervene in this case, and the Clerk is directed to file said intervenors' lodged pleadings herein.

Per Curiam.

United States Court of Appeals
for the District of Columbia Circuit

FILED Apr. 14, 1967

NATHAN J. PAULSON
Clerk

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1966

[SAME TITLE]

Associated Latin Americana Freight Conferences,
National Customs Brokers and Forwarders Association of America, Inc.,
River Plate & Brazil Conferences,
North Atlantic Baltic Freight Conference,
North Atlantic Continental Freight Conference,
North Atlantic French Atlantic Freight Conference,
North Atlantic Mediterranean Freight Conference,
North Atlantic United Kingdom Freight Conference,
Intervenors.

Before:

BAZELON, *Chief Judge;* and TAMM and LEVENTHAL, *Circuit Judges,* in Chambers.

ORDER

On consideration of the motion of the Far East Conference to intervene, it is

ORDERED by the Court that movant's aforesaid motion to intervene be granted and the Far East Conference is allowed to intervene in this case.

Per Curiam.

United States Court of Appeals
for the District of Columbia Circuit

FILED May 18, 1967

NATHAN J. PAULSON
Clerk

Prehearing Stipulation

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,868

[SAME TITLE]

ISSUES PRESENTED: Counsel for all parties stipulate that the issues herein are as follows:

1. Did the respondent Federal Maritime Commission act within the scope of its statutory authority in promulgating its General Order 4, Amendment 10?

2. Was the aforesaid order arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law?

3. Was the aforesaid order required to be and was it supported by substantial evidence?

4. Was the aforesaid order contrary to constitutional right, power, privilege or immunity?

DESIGNATION OF JOINT APPENDIX

PORTIONS OF THE RECORD TO BE PRINTED: The parties stipulate that the following documents constitute the Joint Appendix:

1. Notice of Proposed Rulemaking. Item 1 of Certified Record.

2. Final Rules—General Order 4, Amendment 10, dated October 19, 1966. Item 36 of Certified Record.

3. Order on Petition for Reconsideration by Federal Maritime Commission, dated March 2, 1967. Item No. 50 of Certified Record.

4. Petition for Review of Order of Federal Maritime Commission.

5. Petitions to Intervene.

6. Orders of Intervention.

7. Prehearing Stipulation.

8. Prehearing Order.

Any party and the Court, at and following the hearing in this case and in the briefs, may refer to any portion of the original transcript of record herein which does not appear in the Joint Appendix to the same extent and

effect as though such portions of the transcript had appeared in such appendix.

Respectfully submitted,

GERALD H. ULLMAN
Attorney for Petitioner

WALTER H. MAYO, III
JOSEPH F. KELLY, JR.
Attorneys for the Federal
Maritime Commision

IRWIN A. SEIBEL
Attorney for United States

JOHN R. MAHONEY
Attorney for Intervenors,
Various Conference and
Member Lines

THOMAS K. ROCHE
Attorney for Intervenor,
National Customs Brokers and
Forwarders Association of America, Inc.

ELKAN TURK, JR.
Attorney for Intervenor,
Far East Conference

Washington, D. C.
April 25, 1967

Prehearing Order

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,868 September Term, 1966

[SAME TITLE]

Before:

BURGER, *Circuit Judge,* in Chambers.

Counsel for the parties in the above-entitled case having submitted their stipulation pursuant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is approved, and it is

ORDERED that the stipulation shall control further proceedings in this case unless modified by further order of this court, and that the stipulation and this order shall be printed in the joint appendix herein.

United States Court of Appeals
for the District of Columbia Circuit

FILED May 16 1967

NATHAN J. PAULSON
Clerk

SUPPLEMENTAL JOINT APPENDIX

In the

United States Court of Appeals

For the District of Columbia Circuit

Case No. 20,868

New York Foreign Freight Forwarders
and Brokers Association, Inc.,

Petitioners,

—v.—

Federal Maritime Commission and
United States of America,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL MARITIME COMMISSION

TABLE OF CONTENTS

Excerpt from Comments of New York Foreign Freight Forwarders and Brokers Association, Inc., on Proposed Amendments to Subpart B, General Order 4

Dated June 3, 1966

(Item 8)

—5—

* * * * *

Rule 510.23(f)—Comingling of Funds

As amended, the rule would read as follows:

> "(f) Each licensee shall pay over the [sic] ocean-going common carrier or its agent within five (5) days after the receipt thereof or within three (3) days after the departure of the vessel from each port of
>
> —6—
>
> loading whichever is later, all sums advanced the licensee by its principal for freight and transportation charges, and shall disburse to other persons when due all sums advanced by its principal for payment of any charges, debts, or obligations in connection with the forwarding transaction, and shall promptly account to its principal for overpayment, adjustments of charges, reductions in rates, insurance refunds, insurance money paid to the forwarder as a result of claims, proceeds of c.o.d. shipments, drafts, letters of credit and any other sums due such principal."

The present rule requires a licensee to pay over freight monies received from a shipper to the ocean carrier "promptly". The proposed change deletes the word "promptly" and provides that payment shall be made within five (5) days after receipt by the forwarder or

within three (3) days after the vessel's departure, whichever is later.

The purpose of this rule, ostensibly, is to accelerate payment of freight monies by the forwarder to the carrier. When the New York Association was informally requested last year to furnish its view with respect to this proposal, we indicated approval of the idea in principle in preference to companion suggestions which would have provided (1) for a complete prohibition against the commingling of shipper's funds or advances by a licensee with his own working capital and (2) a direct payment by the shipper to the carrier of freights in excess of $10,000. As between the various approaches, we thought that the five and three day rule would be less onerous.

A closer analysis of the proposed rule, however, indicates it will produce material hardship for forwarders, particularly with respect to the smaller ones with limited bookkeeping staffs. In practice, a forwarder usually has a substantial number of shipments from different shippers being carried aboard one vessel of a particular carrier.

—7—

The present procedure is for the forwarder to make out one check per vessel in payment of the ocean freight to the carrier, but he usually holds this check until such time as he has received payment from all or almost all the shippers involved.

If one shipment of the many has been paid by a shipper and held by the forwarder for five (5) days, the proposed amendment would require the forwarder immediately to pay the freight on that one shipment even though it is much simpler and less costly to include it with the other shipments in one check. Thus, the effect of this rule will be to require a multiplicity of checks in payment of the ocean freight by the forwarder where in the past one check

was sufficient. This must necessarily add to the forwarder's cost of operation to a substantial degree.

The rule would also be burdensome because it will impose upon a licensee a duty to keep a very close and constant scrutiny as to the precise day the payment is received on each shipment in order to avoid a breach of the rule. The average forwarder handles hundreds of shipments a week and for him to keep a time check as to the actual date of receipt of payment on each of the shipments will result in the need for extra personnel, thereby adding to the forwarder's cost of operation.

The New York Association believes that the necessity for this rule may be obviated at the present time by reason of the fact that steamship conferences on their own volition are presently taking steps to accelerate the payment of outstanding freight. In New York, New Orleans and San Francisco three major conferences are circulating a Shipper's Credit Agreement which, when signed by a shipper, will obligate him to pay the freight within a stipulated period of time even though the shipper may have already paid the freight to the forwarder, or lose his credit privileges with the lines in the conference.

—8—

Under this new arrangement, if a forwarder fails to pay over promptly any freight monies he has received from the shipper, it may be anticipated that the carrier will communicate with the shipper and require prompt payment. The shipper will instruct his forwarder to pay over the freights promptly to the carrier; if he fails to do so, the forwarder may anticipate that he will no longer keep this customer. Thus, under the Shipper's Credit Agreement setup it will no longer be possible for a forwarder to unreasonably delay payment of freight monies he has received from his shipper. The carriers will be receiving the monies due them within the desired period, as set

forth in the agreement, and there will not, therefore, be any pressing necessity for the proposed amendment to Rule 510.23(f).

Accordingly, we suggest that consideration of this amendment be postponed until such time as it can be ascertained how effective the Shipper's Credit Agreements will be. If they turn out to be successful, the carriers will no longer have a problem of excessive credit and the hardships upon forwarders resulting from the proposed rule will be avoided.

Should the Commission feel, however, that a responsibility should presently be imposed upon the forwarders, then to prevent undue hardship, the New York Association suggests that the five and three day requirement be imposed only upon those individual shipments where the freight due on each exceeds $1,000. In many cases a forwarder has a number of shipments aboard one vessel where the individual freight does not exceed $1,000. Our suggested change will permit the continued use of one check by the forwarder to the carrier to cover a group of lower freighted shipments and will for the most part eliminate the extra costs that the rule would otherwise entail. By requiring freights in excess of $1,000 per shipment to be paid within the period stipulated in the

amendment, the carrier will still be assured of prompt payment under the rule on those shipments where the freight is a significant amount.

Excerpt From Views of the Members of the American West African Freight Conference, Federal Maritime Commission Agreement No. 7680

Dated June 3, 1966

(Item 13)

First: The members of the Conference favor the proposed amendment to paragraph (f) of Section 510.23. This paragraph, as presently in effect, requires the licensed freight forwarder promptly to pay over to the ocean-going common carrier all sums advanced by its principal for the payment of any and all charges, debts or obligations in connection with the forwarding transaction. The amendment proposes to substitute for the indefinite requirement of *prompt* payment, a more definite requirement that the payment to the ocean-going common carrier be within five days after receipt by the licensed freight forwarder of the freight charges from its principal or within three days after departure of the vessel, whichever occurs later.

Upon receipt of prepaid bills of lading from the ocean-going common carriers, freight forwarders, in lieu of paying freight charges, regularly execute due bills which usually provide for the payment of freight charges to the carrier within a specified period of time. Although many freight forwarders do make timely payment to the carrier, some forwarders postpone payment to the carrier for protracted periods of time and, it is believed, use the freight moneys to finance their own businesses. This in itself is wrong, since the carrier is entitled to the freight money which, according to the bill of lading, is earned when the cargo is loaded. Moreover, in certain instances the forwarder has become insolvent between the time of

the issuance of the due bill and the time when the carrier attempts to collect the freight charges. It then becomes a contest in a court of law between two innocent parties, either the shipper or the carrier, as to which will be hurt by the forwarder's insolvency. Under the proposed amendment the forwarder will not be required to pay the carrier until the forwarder has been paid by the shipper. By fixing a brief but practical period within which the forwarder, after receiving payment from the shipper, is required to pay the carrier, the proposed rule will contribute to the prevention of a situation in which the shipper will have to pay freight twice or the carrier will be deprived of the freight charges to which it is entitled.

Excerpt From Reply to Comments, Submitted by Office of Hearing Counsel, Federal Maritime Commission

Dated June 22, 1966

(Item 21)

C. *Section 510.23(f)—Pay Over Rule*

The New York Association filed the only comment opposing this change. Its first objection is to the effect that the rule would cause forwarders to issue a multiplicity of checks. The forwarder has no interest in funds advanced by his shipper clients to pay freight charges, and he holds such funds in trust for his shipper clients. It is no less than his fiduciary duty to "keep a very close and constant scrutiny as to the precise day the payment is received on each shipment", which unaccountably seems abhorrent to the New York Association.

The staff rejects the suggestion that so-called "Shipper's Credit Agreements" may solve this problem, because (1) nothing appears to indicate the exact operation of such agreement; (2) as the staff understands them, they would not prevent a forwarder from comingling or converting funds and; (3) the public interest would not necessarily be protected because such agreements would be between private parties.

Likewise, the staff rejects the New York Association's proposal that the five and three day rule be imposed only on individual shipments where the freight due exceeds $1,000.00 because the aggregate dollar amount of many small shipments could substantially exceed the limitation imposed. The staff feels that the five and three-day rule, as proposed, should apply to all freight monies due regardless of dollar amount in order to adequately protect shippers and carriers.

Excerpt From Answer to Hearing Counsel's Reply, Submitted by New York Foreign Freight Forwarders and Brokers Association, Inc.

Dated July 5, 1966

(Item 26)

2. *Rule 510.23(f)—Commingling of Funds*

In his summary of comments Hearing Counsel notes that commenting conferences support the proposed change on the contention that it will help them prevent losses to a shipper or carrier occasioned when a freight forwarder goes bankrupt (Reply, p. 2). This contention by the carriers is a spectre with little or no basis in fact.

In Docket No. 765, *Freight Forwarder Investigation, Etc.*, 6 F.M.B. 327, information furnished to the Commission in 1957 indicated that the total compensation (brokerage) received from carriers in that year was approximately Eleven Million ($11,000,000) Dollars (p. 336). Based upon the fact that the rate of commission was generally 1¼%, the amount of compensation received in that year indicates that forwarders dealt with shipments involving approximately One Billion ($1,000,000,000) Dollars in ocean freight. Assuming that half of the freight charges, or Five Hundred Million ($500,000,000) Dollars was processed through forwarders (a conservative estimate), a 1% bankruptcy loss to ocean carriers would be Five Million ($5,000,000) Dollars. While there has been an occasional insolvency in the forwarding business, the total loss to carriers represents an infinitesimal fraction of 1% of the freight processed by forwarders. It is, therefore, indisputable that there is no actual business reason for the Commission to adopt the proposed amendment for the purpose of protecting carriers from bankruptcy losses.

Hearing Counsel notes that the forwarder holds the freight charges in trust for his clients and, quoting from our comments, he states that "It is no less than his fiduciary duty to 'keep a very close and constant scrutiny as to the precise day the payment is received on each shipment', which unaccountably seems abhorrent to the New York Association." (Reply, p. 15)

We disagree with Hearing Counsel's contention that a forwarder has a fiduciary duty to keep a close scrutiny as to the day payment is received on each shipment. The forwarder has no such duty. His duty is only to pay over the funds he receives within a reasonable time based upon the practicalities and exigencies of the situation. Requiring a forwarder to keep track of the day of receipt for hundreds of shipments a week and issue a multiplicity of checks in payment of ocean freight, when in the past one check was sufficient, is thoroughly impractical and adds unnecessarily to a forwarder's cost of operation. We state earnestly that the proposed change cannot readily be complied with, even by forwarders who scrupulously observe the Commission's regulations, and that this rule will result in many forwarders being in technical violation. To avoid disrespect for the Commission's regulatory function, a rule which will be honored more by its breach than its observance should not be adopted.

The rule will also have the effect of imposing an unfair financial risk upon a forwarder. There are occasions when the forwarder will receive a check in payment for the ocean freight from his principal when the forwarder may not be sure that the principal has the required funds to cover the check. In the exercise of ordinary prudence, the forwarder waits until the principal's check has cleared before he will issue his own check against it in payment to the carrier. Under the language of the rule the forwarder is required to make payment within five (5) days after re-

ceipt of "all sums advanced the licensee by its principal for freight." If the term "advanced" is construed to mean the date of receipt of the principal's check by the forwarder, then five (5) days is insufficient time, most principals being at either an inland or overseas point, for the check to clear and the forwarder to draw against it. The forwarder must then advance his own funds to meet the five (5) day deadline and run the risk of the principal's default. If the term "advanced" is construed to mean the date when the check of the principal clears and the forwarder's account is credited with it, then the forwarder is in the impossible position of having to keep track of the precise date of clearance and compute his five (5) days thereafter. Obviously, under either interpretation the rule imposes financial risk and insuperable bookkeeping difficulties, all of which should be carefully weighed against the Commission's ostensible interest in helping the carriers collect their freight charges.

Hearing Counsel sets forth three reasons why the staff rejected our suggestion that the so-called Shipper's Credit Agreements may solve the problem. It is asserted that "nothing appears to indicate the exact operation of such agreement." (Reply, p. 15) We do not understand this position. The agreement will require a shipper to pay freight prepaid bills of lading within fifteen (15) calendar days after the date of sailing regardless of whether the shipper has paid the forwarder. The conferences have agreed, apparently, that this is a reasonable time for the collection of prepaid freight. It must be assumed that the conferences will enforce these agreements and thereby receive the freights within the desired time. There is no cogent reason why a procedure satisfactory to carriers and shippers, as evidenced by the credit agreement, must be supplemented by a Commission rule that will work hardship upon forwarders.

As a second reason for rejecting the Shipper's Credit Agreement procedure, it is said that such agreement "would not prevent a forwarder from commingling or converting funds." (Reply, p. 15) *Neither would the proposed amendment to this rule.* When a forwarder receives from his shipper the amount of ocean freight, the forwarder deposits this money in his account with the result that the funds are at that point commingled. The rule does not eliminate the commingling; it seeks only to shorten the period. Nor would the rule prevent the conversion of funds. Once ocean freight has been received by a forwarder, if he is inclined to convert the proceeds he would do so whether he must pay out to the carrier within 5 days or 50.

As a third reason for rejecting the Shipper's Credit Agreement procedure, it is said by Hearing Counsel that "the public interest would not necessarily be protected because such agreements would be between private parties." (Reply, p. 15) We are not aware of what public interest the staff has in mind. Collection of ocean freight is a private matter. It should be enforced privately. If there is any public interest in seeing to it that carriers are paid the ocean freight charges within 5 days, then a similar public interest exists for *the Commission to see to it that carriers compensate forwarders within a like period of time* —which they do not do presently.

The staff has rejected our suggestion that the five (5) and three (3) day rule be imposed only on individual shipments where the freight due exceeds One Thousand ($1,000) Dollars because "the aggregate dollar amount of many small shipments could substantially exceed the limitation imposed." The suggested figure of $1,000 is a flexible one. If the staff feels that it is too high, then we are amenable to a $500 figure per shipment, because even on this reduced basis it would still permit the continued use of one check by the forwarder to the carrier to cover many lower

freighted shipments and would materially eliminate the increased cost of operation that the proposal must otherwise entail.

We question seriously the Commission's authority to impose this rule upon forwarders. The Commission "may only adopt rules necessary to substantive regulation under the Act." *Alcoa Shipping Co.* v. *F.M.C., et al.,* 348 F.2d 756, 761. The only substantive provisions of the Shipping Act conceivably involved are Section 16 (First) or Section 17. The former section may be ruled out as a substantive basis for the rule, since it is clear that the time within which a forwarder is to pay a carrier for freight charges received from a principal cannot constitute an undue preference to any particular person or undue disadvantage to another. Discrimination between shippers is not involved in the pay over process.

Nor does the act of paying over the freight involve a practice "relating to or connected with the receiving, handling, storing or delivery of property" under Section 17. The Commission has traditionally construed the words "receiving, handling, storing or delivery of property" to mean the actual physical aspects of these activities. *Beaumont Port Commission* v. *Seatrain Lines, Inc.,* 3 F.M.B. 556; *Bills of Lading—Incorporation of Freight Charges,* 3 U.S.M.C. 111. In paying over ocean freight, the forwarder does not physically receive, store, handle or deliver property within the meaning of the statute.

The practices covered by the second paragraph of Section 17 are "shipping practices" and when "the purely shipping aspects of the transaction have been completed" the section does not apply. *J.M. Altieri* v. *Porto Rican Ports Authority,* 7 F.M.C. 416, 419-420. "This paragraph relates to services performed at the terminal . . .". *Los Angeles By-Products Co.* v. *Barber S.S. Lines,* 2 U.S.M.C. 106, 114. It is clear that the paying over of freight monies by a forwarder to a carrier is not a shipping practice. It occurs after the exportation is made. Nor is it a service

performed at the terminal. It is clear that Section 17 does not provide a substantive basis upon which the proposed rule may be based. Accordingly, the Commission is without authority to adopt the rule.

Excerpts From Transcript of Oral Argument, September 7, 1966

(Item 35)

—22—

On Behalf of New York Foreign Freight Forwarders and Brokers Association, Inc.

Chairman Harllee: Is it possible comingling of funds and possible use of forwarders of the funds for other purposes that don't exist in these other cases you are talking about?

Mr. Ullman: There is no question about the fact when the shipper pays the freight forwarder, there is a comingling of funds. No question about that.

Chairman Harllee: And, therefore, a possible, say, misuse of them—

Mr. Ullman: Yes.

Chairman Harllee: —where it doesn't exist in these other cases you talked of prompt payment?

Mr. Ullman: Anytime you turn money over to the forwarder, there is a comingling and possible misuse, but I respectfully suggest to the Commission the record does not show this is anything that anybody need to be seriously concerned with.

There have been bankruptcies and defaults by forwarders, but as I pointed out, they are negligible.

Chairman Harllee: But the risk to the person who might lose quite a bit, even though he is a low risk, if a shipper loses $20,000, $30,000, or $40,000, it would be a great loss to the individual.

Mr. Ullman: Yes, there is that risk, but when we are

talking about fractions of one percent, Admiral, I can't get too perturbed about it.

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Chairman Harllee: All right. Now with respect to the proposed amendment to rule 24(a), 510.24(a), which would prohibit a licensee from collecting compensation from a carrier when the licensee's name appears on the ocean bill of lading as shipper or as agent for an undisclosed principal.

You stated in your brief dated June 3rd that the Commission may not lawfully add additional conditions for the receipt of compensation from carriers without a clear Congressional expression of authority to do so.

However, the rule as presently in force provides a licensee whose name appears on the ocean bill of lading as the shipper or simply as agent may still qualify for compensation from a carrier if the licensee discloses the principal's name on a "line copy" of an ocean bill of lading furnished to the carrier. This bill as presently worded seems to impose a condition to the collection of compensation.

But you did not oppose that rule when you appealed certain provisions of General Order 4 to the courts. You are opposing it now as an extra-legal, extra-statute?

Mr. Ullman: We didn't oppose that originally for this reason, there was a proper regulatory purpose being served by the line copy procedure. You can't license a

—31—

person who is shipper of goods and line copy procedure was to indicate to the Commission that when the forwarder appeared as a shipper on the bill of lading, he wasn't really a shipper because he was disclosing the true shipper

on the line copy. That had a proper regulatory purpose: One, to see to it people are not in the forwarding business who are shippers, and two, to see that people didn't receive compensation who are true shippers.

He reveals the true shipper to the carrier under line copy, so there is a very valid distinction between those two situations.

Chairman Harllee: Well, yes, but as far as the authority of the Commission is concerned, it would seem the argument would apply—

Mr. Ullman: I think the Commission was thoroughly authorized to say to a forwarder: If you want to keep a license, you have got to indicate to us you are not really a shipper of goods. And that is what the line copy procedure is intended to do. So you had authority to insist on that, for licensing purposes and rebate purposes, we couldn't question that originally. We thought that was within the Commission's rulemaking authority. But this added feature, Mr. Chairman, is something entirely different.

You are doing this now not for the purpose of preserving the integrity of your licensing system, you are doing this to act as a super-collection agency for our

—32—

friends in the conference, and I don't see that is a proper regulatory purpose.

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—43—

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Chairman Harllee: All right. Now, I thoroughly understand that you think the forwarders shouldn't have to be used to enforce dual rate contracts, but let me ask you this, in case you wish to make any comments, what do you think that the Commission should do to prevent

the forwarders from being used by shippers who volun-

—44—

tarily enter dual rate contracts in circumventing these contracts? Do you care to comment on that?

The conferences claim they are being used. The forwarders have been used in certain cases, you realize that?

Mr. Ullman: I am prepared to concede that, Commissioner Harllee.

Chairman Harllee: And I know you contended there are many cases where there are dual rate contracts and valid reasons for it. Where there are not valid reasons for it, what action do you think the Commission should take?

Mr. Ullman: I am prepared to concede the forwarders on occasion are used by shippers to help bring about a violation of the dual rate contract. All I have said here is the dual rate contract is a private civil agreement. We don't feel it is the Commission's function to see to it that that agreement is enforced. Despite my choice of somewhat unfortunate language, we just don't think that has been the Commission's bailiwick.

Chairman Harllee: Well—

Mr. Ullman: Let me just point this out, Mr. Harllee. You have authorized in the dual rate cases certain procedures whereby the conferences have rather extensive powers to require from shippers information with respect to specific shipments, even on nonconference shipments. That is a large jurisdiction you have given shippers. They can delve into information involving a dual rate shipper, if he has been a party to it, even though it moved by a

—45—

nonconference vessel; you have given broad discovery powers in that dual rate agreement. All they have to do, it seems to us, rather than get us in the middle, is to use their discovery powers to enforce the agreements if

they feel there is a violation. This is their function, not the Commission's.

Chairman Harllee: I think they will say they don't have broad enough powers, but perhaps I should let them say it, if there are some limitations on that.

Mr. Ullman: All right, sir.

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—73—

On Behalf of North Atlantic Baltic Freight Conference, et al.

* * * * *

Now, first let's consider the pay-over rule, 23(f). The only opposition to this rule, at least on the statements, came from, the serious opposition came from the New York Freight Forwarders Association, although here this morning others have brought it up collaterally.

I think they have raised—their objections are capricious. For instance, the objection it would cause forwarders to issue a multiplicity of checks, it seems to us it is incredible in fact that the Association can seriously argue that the Commission is imposing on its members in asking them, the various members of the Association, to keep a close and a constant scrutiny as to the precise day that the licensee receives payment from his principal on each shipment. It is money that has been turned over and should be ours as soon as is practicable.

Now, we would concede 5 days—as a matter of fact,

—74—

Mr. Ullman didn't get into that in his argument, but in anticipation of this argument, I made a check with the Federal Reserve in New York. They publish a series of rules as to the number of days it takes to clear checks, and after examining this register, as it is called, I find that about 99 percent of the cases in and throughout the United States, checks can be cleared within a 5-day period. For instance, in the New York-San Francisco relationship,

everything is done by air mail, and it is actually cleared in about 2 days. So on the issue he raised in one of his comments that he didn't make this morning, I think that 5 business days would be a perfectly reasonable time, as far as minimizing, and in fact making darn sure that the forwarders didn't run into any risk at all of a check given to them by the shipper being returned for nonpayment of funds.

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—110—

On Behalf of Viking Line and Orient Overseas Line

* * * * *

With reference to Section 510.24(a), we would comment that the device of using a forwarder as agent and a bill of lading without divulging the name of the shipper principal is a practice of long standing, and is used for a number of purposes, not the least of which is admittedly the avoidance of the inevitable problems which ensue when a conference contract shipper utilizes an independent vessel, even in the many cases where he has the legal right to do so.

If Section 510.24(a) is adopted, the name of the shipper principal would necessarily appear on all copies of ocean bills of lading and manifests as well. We fail to understand how this would aid American foreign commerce. Although it is plain that it would be helpful to the conferences in a search for shippers supposedly violating conference agreements. It has been said here earlier that there are other reasons for this proposal but so far we

—111—

have failed to hear them. Undoubtedly there would be some conference contract shippers who faced with the prospect of having their name appear in an independent line document would either through lack of knowledge of their legal position or through sheer timidity refuse busi-

ness routed by bias and independent services to the detriment of American exports.

Also, there are principals who for their own reasons do not wish to be identified with certain of their imports or exports. Additionally, there is the question of consolidations. Carloading consolidations and the upcoming container consolidations. To list each and every shipper, the shipper's name and such bill of lading will not only be burdensome but encroaching.

* * * * *

Excerpt From Petition for Reconsideration and Application for Postponement of Effective Date, Filed by New York Foreign Freight Forwarders and Brokers Association, Inc.

Dated November 9, 1966

(Item 37)

—8—

* * * * *

4. *Section 510.24(a)—Disclosure of Shipper's Name on Ocean Bills of Lading*

This amendment has been adopted, according to the majority, in fulfillment of "the Commission's positive duty to prevent unlawful rebating." To that end, the majority states that a rule should be adopted "which authorizes the payment and receipt of brokerage only where the identity of the actual shipper is fully disclosed" (p. 6).

We are at a complete loss to understand the Commission's rationale. Under the "line copy" procedure heretofore provided for, the identity of the actual shipper *was* fully disclosed on a copy of a bill of lading given to the carrier which is available for Commission inspection.* This being so, what conceivable danger is there of "unlawful rebating"? All that the carrier or the Commission need do under the line copy procedure is examine the bill of lading to see whether the forwarder has identified the true principal. If he has, there can be no possibility of a rebate. What possible difference does it make if the disclosure is at the top of the document or further down in the body? The line copy procedure was, therefore, entirely adequate to prevent rebating and in the absence of any

* The copy of the export declaration given the carrier also indicates the true shipper's identity.

vidence whatsoever to the contrary shown in this record, there was no regulatory need which dictated a change in the rule.

At the bottom of page 6 of the majority opinion there is quoted a response made by counsel for the New York

—9—

Association to a question put by Chairman Harllee which the majority has used to support the amendment eliminating the line copy procedure. The use of counsel's response for this purpose is regrettable. If the entire colloquy between the Chairman and counsel, contained on pages 30-32 of the transcript is read, it will be seen that the purport of counsel's remarks was to explain and justify the regulatory purpose served by the line copy procedure and *not* by the proposed amendment eliminating it. It is distressing to see one sentence, taken out of context, employed by the majority to support precisely the opposite position being maintained by counsel.

* * * * *

JOINT BRIEF FOR ASSOCIATED LATIN AMERICAN FREIGHT CONFERENCES *ET AL.* AND FAR EAST CONFERENCE AND THEIR MEMBER LINES

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 20,868

NEW YORK FOREIGN FREIGHT FORWARDERS and BROKERS ASSOCIATION, INC.,

Petitioners,

—v.—

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL MARITIME COMMISSION

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Statement of Questions Presented

In the opinion of the Intervening Conferences, the questions presented in this proceeding are:

1. Is the Federal Maritime Commission authorized under Sections 43 and 44 of the Shipping Act, 1916, as amended, to issue rules to effectuate the purposes of the Act, even when such rules regulate conduct not found to have been in violation of express prohibitions of the Act?

2. Is Rule 510.22(a) invalid on the ground that ocean carriers must be licensed under Section 44 of the Shipping Act, 1916, as amended, to perform services also performed by forwarders, or on the ground that such carriers may not, whether subject to licensing or not, perform such services free of charge?

3. May the Federal Maritime Commission, by Rule 510.23(f), fix a time limit within which licensed freight forwarders must pay over to carriers monies received by forwarders from their shipper principals for the payment of freight charges; and, if so, is Rule 510.23(f), a reasonable exercise of the Commission's jurisdiction?

4. May the Federal Maritime Commission, in Rule 510.24 (a), require ocean freight forwarders to disclose effectively the names of their shipper principals in order to receive compensation from carriers, when the purpose of the requirement is to forestall unlawful rebates and to facilitate the enforcement of dual-rate contracts?

5. May the Federal Maritime Commission use its rule making power to require, in Rule 510.24(f), common carriers to publish in the tariffs filed pursuant to Section 18(b) of the Shipping Act, 1916, as amended, the rates of compensation paid to freight forwarders and the conditions of payment?

INDEX

Table of Authorities

Other Authorities:

In the

United States Court of Appeals

For the District of Columbia Circuit

Case No. 20,868

New York Foreign Freight Forwarders
and Brokers Association, Inc.,

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ON PETITION FOR REVIEW OF AN ORDER OF
THE FEDERAL MARITIME COMMISSION

JOINT BRIEF FOR ASSOCIATED LATIN AMERICAN FREIGHT CONFERENCES *ET AL.* AND FAR EAST CONFERENCE AND THEIR MEMBER LINES

Introduction

This brief is submitted on behalf of 19 steamship Conferences and the 82 common carriers who are members of one or more of the Conferences. The names of the Conferences and their members are set forth in Appendix A hereto. All of these Conferences establish rates for ocean carriage under Agreements approved by the Federal Maritime Commission ("Commission"). They are all based in New York City. Eleven of the Conferences, known collectively as the Associated Latin American Freight Conferences, serve the trade between United States At-

lantic and Gulf ports on the one hand, and ports on the North and West Coast of South America, the West Coast of Central America and all of the Caribbean area, except for Puerto Rico and the Virgin Islands, on the other. These Conferences have a common Chairman, Charles D. Marshall.

The North Atlantic Mediterranean Freight Conference serves the trade between United States Atlantic ports and ports on the Mediterranean coast of Europe. The Chairman is David M. McNeil.

Two of the Conferences, the East Coast South America Reefer Conference and River Plate and Brazil Conference serve the trade between the United States Atlantic and Gulf ports, on the one hand, and ports in Brazil, Argentina, Uruguay and Paraguay on the other. Wilbur Van Emburgh is the Chairman of each of these Conferences.

The North Atlantic Baltic Freight Conference, North Atlantic Continental Freight Conference and North Atlantic French Atlantic Freight Conference collectively serve trades between United States Atlantic ports and Danish, Finnish, Norwegian, Polish, Swedish, German, and Soviet Baltic ports, and Belgian, Dutch, Icelandic, German, and French Atlantic ports. Mr. Charles J. Moran is the Chairman of these Conferences.

The North Atlantic United Kingdom Freight Conference serves the trade between United States Atlantic ports and ports in the United Kingdom and Eire. Mr. Richard J. Gage is Chairman of that Conference.

The Far East Conference serves the trade from ports on the Atlantic and Gulf coasts of the United States to ports in Japan, Okinawa, Korea, Taiwan, Siberia, Manchuria, China, Hong Kong, the Philippines, Viet Nam,

Cambodia and Laos. The Conference Chairman is Raymond J. Flynn.

These Conferences and their member lines participated throughout the rule making proceeding of the Federal Maritime Commission, docketed as number 66-31. They have been concerned at every stage before the Commission with three of the four amendments to General Order 4, Subpart B on which Petitioner seeks review. The Conferences' concern in the proceedings before the Commission was restricted to the amendments to 46 CFR § 510.23(f), the "pay over" rule; § 510.24(a), the "undisclosed principal" rule; and § 510.24(f), the "disclosure of the amount of brokerage" rule. The Conferences took no position before the Commission with respect to the amendment to Rule 510.22(a) which authorizes carriers to provide freight forwarding services free of charge if the free services are set forth in the carriers' tariff. In this brief, the Far East Conference endorses Rule 510.22(a), but the other Intervening Conferences take no position with respect thereto.

The challenged amendments read as follows:

> "Section 510.22, Oceangoing common carriers and persons shipping for own account, is amended by revising the second sentence of paragraph (a) and by inserting thereafter a new sentence. The affected portion reads as follows:
>
> > "An oceangoing common carrier may perform freight forwarding services without a license only with respect to cargo carried under its own bill of lading, in which case the charge(s) for each forwarding service the carrier is willing to perform shall be assessed, in accordance with the carrier's published tariffs on file with the Commission. Any forwarding service on cargo carried under its own

bill of lading which the carrier is willing to perform free of charge, including presentation of executed Shipper's Export Declarations to customs authorities, shall be specified in its tariffs.

"Section 510.23 Duties and obligations of licensees.

• • •

"(f) Each licensee shall promptly pay over to the oceangoing common carrier or its agent within seven (7) days after the receipt thereof, excluding Saturdays, Sundays and legal holidays, or within five (5) days after the departure of the vessel from each port of loading, excluding Saturdays, Sundays and legal holidays, whichever is later, all sums advanced the licensee by its principal for freight and transportation charges, and shall disburse to other person(s) when due all sums advanced by its principal for the payment of any charges, debts or obligations in connection with the forwarding transaction, and shall promptly account to its principal for overpayments, adjustments of charges, reductions in rates, insurance refunds, insurance money paid to the forwarder as the result of claims, proceeds of c.o.d. shipments, drafts, letters of credit and any other sums due such principal.

• • •

"Section 510.24 Compensation and freight forwarder certifications.

"(a) No oceangoing common carrier shall pay to a licensee, and no licensee shall charge or receive from any such carrier, either directly or indirectly, any compensation or payment of any kind whatsoever, whether called "brokerage", "commission", "fee", or by any other name, in connection with

any cargo or shipment wherein the licensee's name appears on the ocean bill of lading as shipper or as agent for undisclosed principal.

• • •

"(f) An oceangoing common carrier may compensate a licensee to the extent of the value rendered such carrier in connection with any shipment forwarded on behalf of others when, and only when, such carrier is in possession of a certification in the form prescribed in paragraph (e) of this section. Every tariff filed pursuant to section 18(b)(1), Shipping Act, 1916, shall specify the rate or rates of compensation to be paid licensed forwarders certifying in accordance with rule 510.24(e) of this part, and the conditions of payment."

Interest of the Conferences

Section 510.23(f) will require freight forwarders to pay over monies in their possession for transmittal to the carriers within a specified number of days. The Conferences and their member lines work closely with many of the ocean freight forwarders who are employed by shippers to assist the shippers in dispatching their cargo overseas. Forwarders book cargo space, prepare shipping documents, lodge consular invoices and make insurance arrangements on behalf of their shipper principals. Many shippers customarily entrust to their freight forwarders money to pay the freight charges of the carriers. The currently effective Section 510.23(f), under which the carriers and forwarders have been operating, merely requires the forwarders to pay over freight monies received from shippers "promptly." The present standard, "promptly", cannot be policed and is so vague as to be completely ineffective. The present

practice under which forwarders retain, for indefinite periods of time, monies paid by the shippers and belonging to the carriers is seriously damaging the carriers. This practice prevents the carriers from using money lawfully theirs and depletes their working capital.

Section 510.24(a) will require a forwarder to put the actual shipper's name on all copies of the bill of lading rather than listing himself as "shipper" on all but the "line copy." A carrier may not pay brokerage to a forwarder if the forwarder is the actual shipper. Such a payment is an unlawful rebate. At present, the actual shipper must be disclosed only on the "line copy" of the bill of lading, which is retained by the carrier. Due to the frequency with which forwarders appear as shippers on the other copies of bills of lading, which circulate beyond the files of the issuing carriers, it has become apparent that the "line copy" rule has not been effective in disclosing and deterring unlawful rebates to forwarders.

The primary reason forwarders appear so frequently as shippers is that shippers are hiding behind the forwarders to conceal their violations of their dual rate contracts. The Conferences have in effect dual rate contracts under which shippers in return for agreeing to confine their goods to the Conference lines, receive transportation at a discount. These dual rate exclusive patronage agreements have all been specifically approved by the Commission pursuant to Section 14b of the Shipping Act, 1916 (the "Act"). The Conferences and the member lines are responsible for treating all shippers without discrimination and one of the Commission's primary regulatory functions is to insure that carriers do not discriminate and that shippers, by false statements or other unfair devices, do not obtain transportation at reduced rates. Since under the dual rate contracts, certain shippers, otherwise indistinguishable

from their competitors, obtain lower rates solely because they agree to give all of their patronage to the Conference lines, it is the duty of the Conferences and Commission to insure that the shippers' obligation is met.

Section 510.24(f) will require the carriers paying brokerage to freight forwarders to publish the rates, terms and conditions of the brokerage in their tariffs. These Conferences believe that unless the Commission and the shipping public know the exact brokerage rates being paid, it will be impossible for the Commission to supervise brokerage practices in any way. Moreover, without this rule, the Conferences, who publish in their tariffs the rates of brokerage they pay, cannot compete effectively with other carriers who do not.

Outline of Argument

The Commission has the power to promulgate the rules under review in this proceeding. Section 44 of the Act embodies a comprehensive charter for the regulation of freight forwarders by the Commission. Section 44(c) of the Act confers on the Commission a broad rule making power. Under Section 44(c), the Commission can, as it has done here, define standards of conduct which licensed forwarders are bound to observe, and it can, as it has done here, promulgate rules affecting forwarders that will assist it in carrying out its regulatory functions.

Section 43 of the Act confers on the Commission the power to make rules to carry out all the provisions of the Act, including Section 44. This rule making power, which bears on all persons subject to the Act, authorizes the Commission to promulgate these rules.

Each of the rules under attack here is a valid exercise of the Commission's rule making power.

ARGUMENT

I.

The Commission Has Adequate Rule Making Authority Under Sections 43 and 44(c) of the Act to Promulgate These Rules.

In its effort to bolster its contention that the Act permits the Commission to promulgate only rules to prevent practices which have been found to be violative of substantive provisions of the Act, Petitioner advances the same erroneous arguments which have been repeatedly and vigorously condemned by the Commission and recently by the Court of Appeals for the Second Circuit. Petitioner has ignored the clear meaning of the applicable statutory provisions, misinterpreted or ignored the legislative history of the 1961 amendments to the Act, relied on cases which simply do not support its position, and, finally, cavalierly dismissed the recent opinion of the Second Circuit upholding regulations of the Commission substantially identical to those involved herein as inadequately dealing with petitioner's "authorities or with the legislative history." We submit that these and other arguments which Petitioner seeks to resurrect in these proceedings are demonstrably devoid of merit.

1. *Section 44(c)*

No legislation is conceived in a vacuum. Petitioner's arguments ignore the arduous struggle to establish more adequate controls of the freight forwarder industry which was the genesis of Section 44 of the Act. Shortly after the Supreme Court, in *United States* v. *American Union Transport, Inc.*, 327 U.S. 437 (1946), held that freight forwarders

are subject to the Act, the Commission completed the public investigation of the freight forwarder industry which it had undertaken in 1942. *Port of New York Freight Forwarder Investigation,* 3 U.S.M.C. 157 (1949). Later, in 1954, a second broad investigation of the forwarding industry was commenced which culminated with the publication of a comprehensive report on June 29, 1961. *Investigation of Practices, Operations, Actions and Agreements of Ocean Freight Forwarders,* 6 F.M.C. 327 (1961).

In the course of these extensive investigations the Commission uncovered many disturbing improprieties in forwarder practices. Charges for accessorial services, for example, were marked up "in a random fashion." Moreover, the 1961 report concluded:

> "The record compels the conclusion that, in the assessment of charges by forwarders to their shippers, the practice of discrimination, preference, and prejudice is the rule rather than the exception." 6 F.M.C. at 359.

In addition, the 1961 study disclosed that the carriers paid brokerage fees to forwarders without ascertaining whether the forwarders had performed any services and when in fact forwarders had done little or nothing to earn such fees. *Id.,* at 349. The Commission found such payments to be the equivalent of unlawful rebates and therefore illegal under Section 16 in situations where the forwarder was a "dummy"—*i.e.,* a subsidiary or otherwise a conduit for the receipt of brokerage by the shipper —or where a forwarder who was not a "dummy" reduced or waived fees against the shipper in contemplation of the payment of brokerage by the carrier. *Ibid.*

It was against this background of "discrimination, preference, and prejudice" that the issue of freight forwarder

practices was presented to the Congress. In the Congressional hearings on the proposed 1961 forwarder legislation, reference was repeatedly made to the extensive findings and conclusions of the Commission in its two investigations. Invariably, the conclusion of those asked to submit reports on the proposed legislation was that there was an obvious need to regulate the practices of freight forwarders. For example, the Comptroller General of the United States, Joseph Campbell, stated in his report that:

> "In view of this and other questionable practices, we believe there is a definite need for specific regulatory control over this segment of the maritime industry . . . ." Hearings on H.R. 2488 before the Subcommittee on Merchant Marine of the Committee on Merchant Marine and Fisheries, House of Representatives, 87th Cong., 1st Sess. 2 (Aug. 8, 9, and 10, 1961).

The original version of the forwarder legislation in the House, H.R. 2488, was not clear as to whether a broad rule making power was given the Commission to correct these practices. The original draft provided:

> "(c) The Board shall prescribe reasonable rules and regulations to be observed to regulate the licensing of independent ocean freight forwarders. . . ." *Id.*, at 2.

Significantly, H.R. 7573, an alternative House proposal, specifically provided for a broad rule making power:

> "The Board shall prescribe reasonable rules and regulations to be observed by any person holding a forwarder's license. . . ." *Id.*, at 11.

When asked to compare the two versions of the House bill, those asked to submit reports on the proposed legislation inevitably responded that Subsection (c) of H.R. 2488

did not adequately set forth the scope of the Board's regulatory powers. For example, William A. Stigler, Chief, Office of Regulations, Federal Maritime Board, stated:

> "With respect to the licensing provisions of H.R. 2488, *the Board's authority to regulate licensees* should be made more clear. It is accordingly recommended that the word 'by' be substituted for the words 'to regulate the licensing of' on line 14 of page 3 of the bill." [Emphasis added.] *Id.*, at 18.

Moreover, the Senate version of the bill provided:

> "(c) The Commission shall prescribe reasonable rules and regulations to be observed by independent ocean freight forwarders. . . ." S. 1368, 87th Cong., 1st Sess. (1961).

The announced purpose of the Senate bill as stated in the Senate Report makes it unambiguously clear that substantive regulation of forwarders was intended:

> "Section [44(c)] would direct the Board to prescribe reasonable rules and regulations to be observed by independent ocean freight forwarders, and requires the forwarder to furnish a bond or other security acceptable to the Board, to insure financial responsibility and proper performance of the services concerned." S. Rep. No. 691, 87th Cong., 1st Sess. 2 (1961).

Similarly, in explaining the purpose of the proposed rule making provision, the Senate Report further states:

> "*We recognize that malpractices have been widespread in the past, but we are confident that the regulatory authority given the Board in this bill will prevent such practices in the future,* and we therefore have no

> hesitancy in recommending that the bill as amended be approved." [Emphasis added.] *Id.*, at 6.

The comments of those asked to submit reports on the Senate bill support the conclusion that substantive regulatory authority was intended to be given the Commission. For example, the Interstate Commerce Commission commented that:

> "S. 1368 would amend the Shipping Act of 1916 (46 U.S.C. 801 et seq.) so as to provide for the licensing *and regulation of independent ocean freight forwarders. . . .*" [Emphasis added.] *Id.*, at 7.

It is of considerable significance, therefore, that the Senate version with respect to Subsection (c) prevailed. The present statutory provision is now identical to the Senate draft:

> "The Commission shall prescribe reasonable rules and regulations to be observed by independent ocean freight forwarders. . . ."

Viewed against the background of discriminatory practices existing in the freight forwarder industry as documented in both the House and Senate Reports and considering the need for a flexible response to cope with these abuses as well as supporting statements in both the Senate and House Reports, Section 44 of the Act was clearly intended to be a comprehensive scheme for the regulation of freight forwarders, which, standing alone, gives the Commission a broad range of powers to impose standards of conduct on the forwarding industry. Congress showed none of the reluctance to regulate the domestic forwarder industry that it has shown with respect to ocean carriers in foreign commerce. We submit that the only reasonable in-

terpretation of Section 44(c) is to repose in the Commission substantial regulatory power over freight forwarder practices and not merely a power to regulate conditioned upon a finding that a substantive provision of the Act has been violated. This is precisely the same type of regulatory power as that discussed by the Supreme Court in *American Trucking Association, Inc.* v. *United States*, 344 U.S. 298, 309-310 (1953):

> "All urge upon us the fact that nowhere in the Act is there an express delegation of power to control, regulate or effect leasing practices, and it is further insisted that in each separate provision of the Act granting regulatory authority there is no direct implication of such power. Our function, however, does not stop with a section-by-section search for the phrase 'regulation of leasing practices' among the literal words of the statutory provisions. As a matter of principle, we might agree with appellants' contentions if we thought it a reasonable canon of interpretation that the draftsmen of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of every evil sought to be corrected. But no great acquaintance wtih practical affairs is required to know that such prescience, either in fact or in the minds of Congress, does not exist. [Citing cases.] Its very absence, moreover, is precisely one of the reasons why regulatory agencies such as the Commission are created, for it is the fond hope of their authors that they bring to their work the expert's familiarity with industry conditions which members of the delegating legislatures cannot be expected to possess. *United States* v. *Pennsylvania R. Co.*, 323 U.S. 612." [Footnote omitted.]

Significantly, it was only after having extensively analyzed the background of freight forwarder practices that the Court of Appeals for the Second Circuit sustained the Commission's power to prescribe substantive regulations substantially identical to those involved herein *without a prior finding of unlawfulness. New York Foreign Freight Forwarders and Brokers Association, Inc.* v. *Federal Maritime Commission and United States of America,* 337 F.2d 289 (2d Cir. 1964).

The authorities relied on by Petitioner do not diminish the strength of the holding by the Second Circuit with respect to Section 44(c). Certainly the case of *Alcoa Steamship Company* v. *F.M.C.,* 121 U.S. App. D.C. 144, 348 F.2d 756 (D.C. Cir. 1965), in no way bolsters Petitioner's contentions. In fact, Petitioner's reliance on the passage from the *Alcoa* case at page 23 of its brief that "the Commission may only adopt rules necessary to substantive regulation under the act", seriously undermines Petitioner's position herein. Petitioner's contention that "substantive regulation" presupposes a finding of a violation of the Act is simply not supportable. If anything, *Alcoa* stands for the proposition that the 1961 amendments to the Act gave the Commission an enlarged rule making power. Indeed, this Court has in fact cited *Alcoa* for precisely this proposition. *Pacific Coast European Conference and its Member Lines* v. *F.M.C.,* Case No. 20,195, D.C. Cir., March 31, 1967 (slip opinion). Moreover, it should be pointed out that the *Alcoa* decision did not deal with the specific grant of regulatory authority contained in Section 44(c), but rather with Section 43 which we discuss later. Similarly, *Docket 65-5, Proposed Rule Covering Time Limit on the Filing of Overcharge Claims,* F.M.C., June 28, 1966, which we discuss in detail later, did not involve Section 44(c) and thus is not

relevant to a determination of the scope of regulatory authority contained in Section 44(c).

We submit, therefore, that the language of Section 44(c) on its face, and the legislative history and authorities interpreting this provision clearly indicate that Congress intended to vest a broad rule making power in the Commission with respect to freight forwarding practices.

2. *Section 43.*

With respect to Section 43, Petitioner's contention that this section "did not empower the agency to regulate any and all practices of those subject to its jurisdiction, but only conduct specifically prohibited by the substantive provisions of the 1916 Act" blithely ignores both the Section's legislative history and its judicial interpretation. This Section provides:

> "The Commission shall make such rules and regulations as may be necessary to carry out the provisions of this Act."

The three amendments to which Section 43 is relevant herein are Rule 510.22(a), the "forwarding services by carriers" rule, Rule 510.24(a), the "undisclosed principal" rule, and Rule 510.24(f), the "disclosure of the amount of brokerage" rule. Rule 510.22(a) regulates carriers insofar as they do acts which may also be done by forwarders. Rules 510.24(a) and 510.24(f) regulate, to a certain extent, carrier practices. However, it is important to point out that carriers are regulated in the latter two instances only in order to provide more effective control of potential violations of the Act arising out of forwarder-carrier relationships. In short, all that each of these rules seeks to do is attempt to remedy and deter unlawful practices, and, in the instance of Section 510.24(f), to provide an adequate

procedural means whereby the Commission can adequately police the rebate provisions contained in Section 16 of the Act. We contend that the legislative history of Section 43 and its judicial interpretations amply sustain the Commission's authority to promulgate the rules.

Petitioner has placed considerable reliance on *Docket 65-5, Proposed Rule Covering Time Limit on Filing of Overcharge Claims, supra.* We submit that this reliance is misplaced.

First, and most importantly, Docket 65-5 was expressly instituted for the purpose of determining whether specified carrier practices violated named substantive provisions of the Act, and if so, whether a corrective rule should be adopted. 30 F.R. 4081. When no violations were found on the record before the Commission, the Commission properly concluded that the purpose of the proceeding had been fulfilled, and also indicated that it might choose later to reconsider the subject. Therefore, the Commission did not call upon itself to consider whether Section 43 of the Act could serve as a basis for substantive rule-making. Significantly, the Commission has recently reopened Docket 65-5 for the express purpose, *inter alia,* of determining whether the same carrier practices warrant regulation under Section 43. 32 F.R. 3792. We conclude, therefore, that reliance on this decision and on certain language therein, is inappropriate in the present proceeding.

Moreover, we submit that these three rules, Rule 510.22(a), which interprets the Act; Rule 510.24(a), which is essentially a disclosure provision, and Rule 510.24(f), which is a provision necessary for the Commission to supervise brokerage practices in order to detect and prevent unlawful rebating under Section 16 of the Act, fall within the permissible area of regulation delineated by

the Commission in Docket 65-5. The first merely applies the Commission's expert construction of the Act. The other two are simply procedural means by which the Commission supervises and polices—and hopefully prevents—unlawful practices. Certainly these rules are of an entirely different character from the outright prohibition of a carrier practice which was involved in Docket 65-5.

There can be no question that the legislative history of Section 43 establishes a strong Congressional purpose to give the Commission precisely the kind of authority needed to promulgate rules such as those involved herein. Originally, the House measure contained a rule making provision as follows:

> "(c) The Board shall make such rules and regulations as may be necessary to carry out sections 14 First (b), 15, 18(b), 19(b), 20 and 21 of this act." H.R. 6775, 87th Cong., 1st Sess. (1961).

The intent here was to provide the Commission with the same type of general rule making power which had hitherto only been given the Commission in specific sections of the Act. See, for example, Section 17 of the Act. However, at the "urgent request" of the Maritime Commission this general rule making power was extended to all provisions of the Act. In explaining this rule making provision, the Senate Report states:

> "A new Section 43 would be added to the Shipping Act, 1916, to require the Commission to make such rules and regulations as may be necessary to carry out the provisions of the Shipping Act, 1916, as amended. This would broaden considerably the Commission's rule-making power as originally outlined in the bill." S. Rep. No. 860, 87th Cong., 1st Sess. 20 (1961).

Surely, this "broad rule-making mandate," *id.* at 14, indicates a congressional purpose to avoid trying to freeze into legislation solutions to problems with which the Commission, through the application of its expertise, is better equipped to deal. *Ibid.* If the exercise by the Commission of its rule making authority were intended to be conditioned upon a finding of unlawfulness, this "broad mandate" would dissolve into nothing more than a direction to the Commission to instruct the regulated industries not to engage in activities that Congress has already determined to be illegal. To call this "regulation" is absurd. In short, the regulatory power which Congress intended the Commission to exercise under Section 43 includes the power to promulgate rules and regulations reasonably designed to implement the broad purposes of the Act. Surely this is precisely the type of general regulatory power of which the Supreme Court spoke at length in *American Trucking Association, Inc.* v. *United States, supra,* and which clearly sustains promulgation of the rules at issue herein.

As indicated from our previous discussion, the *Alcoa Steamship Company* case, *supra,* and Docket 65-5, *supra,* do not diminish the strength of our conclusions. In fact the cases which have dealt with the precise issue of the scope of the Commission's authority under Section 43 support the Commission's exercise of authority here. In *New York Freight Forwarders and Brokers Association, Inc.* v. *Federal Maritime Commission and United States of America, supra,* for example, the Second Circuit rejected the "restrictive view" of the Commission's authority urged upon it, and sustained the very regulations, amendments to which are herein sought to be sustained. Moreover, this Court, in *Pacific Coast European Conference and Its Member Lines* v. *F.M.C., supra,* turned back a similar attack on

the Commission's power to issue rules and regulations defining statutory standards without first having found a substantive violation of the Act. The court stated:

> "[The] argument is essentially this: At least in the case of a long standing agreement which has been previously approved under Section 15, the Commission cannot terminate that approval except by reference to the standards of Section 15 itself, and only then after evidentiary hearing and upon precise findings as to the particulars in which the agreement is in conflict with those standards. It is not enough for the Commission to appraise the agreement in the light of requirements which it has formulated by rule, and to declare the agreement deficient it it falls short of any of those requirements. Since those requirements have not been set forth by Congress in haec verba in Section 15, the agreement cannot be said to be in conflict with Section 15." *Id.*, at 6.

The court emphatically rejected this argument:

> "This contention has the antique virtues of simplicity and straight-forwardness. The difficulty is that it is a doctrinal archaism in modern administrative law. It comes, indeed, at a time when many knowledgeable voices have been urging the agencies to make greater, rather than less, use of their rule-making authority in the interest of more precise definition of decisional standards.
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> ". . . [T]he essence of rule-making is generality of application. . . . Moreover, the Commission in rule-making is not confined to the redress of demonstrated evils as distinct from the prevention of potential ones." *Id.*, at 7, 8.

By a parity of reasoning, the Commission's authority to promulgate the rules in the present case cannot be confined to or conditioned upon a prior determination of unlawfulness. The conclusion is inescapable, therefore, that the authority needed to sustain these rules is reposed in the Commission by virtue of Section 43. The statute says as much on its face, there is compelling judicial authority to this effect, and the legislative history is substantially in accord.

II.

The Rules Are Reasonably Designed to Achieve the Purposes of the Act and Are Therefore Not Arbitrary or Unreasonable.

The Petitioner takes the position that a rule promulgated by the Commission under its rulemaking power must be supported by a finding that the Act has been violated. In this assumption, the Petitioner has confused the rule making power of the Commission with its adjudicatory power. The very nature of the rulemaking process and the scope of judicial review thereof precludes application of the "substantial evidence" rule which governs findings of violations of the Act. In promulgating rules the Commission must, to be sure, entertain the views of interested persons. It need not, however, conduct any species of adversary proceeding. The standard for judicial review of such rules is not the "substantial evidence" test but is, rather, whether the rules are reasonable and within the Commission's jurisdiction. As this Court has recently made clear, it recognizes that the rule-making power is

> ". . . particularly adapted to and needful for sound evolution of policy in guiding the future development of industries subject to intensive administrative regu-

> lation in the public interest, and that such rulemaking is not to be shackled, in the absence of clear and specific Congressional requirement, by importation of formalities developed for the adjudicatory process and basically unsuited for policy rulemaking." *American Airlines, Inc.* v. *C.A.B.*, 359 F.2d 624, 629 (D.C. Cir. 1966), *cert. den'd*, 385 U.S. 843 (1966).

The quasi-legislative rule making process established by Section 4 of the Administrative Procedure Act, 5 U.S.C. § 553 (the APA), is based on the recognition that the Commission must have the latitude to prescribe regulations based on considerations of policy, and not solely or even predominantly on an evidentiary record. Only by ignoring this fundamental characteristic of the rule making process embodied in the APA, can the Petitioner argue that the Commission's rule-making power, which is clearly of the sort contemplated by Section 4 of the APA, can never be used to promulgate quasi-legislative rules grounded in considerations of policy, but can only be used to issue rules based, in effect, on a quasi-judicial finding of guilt by the persons affected by the rules.

1. *Rule 510.22(a)—Forwarding Services by Carriers

The Commission has not by this rule authorized unlicensed forwarding by carriers in a manner contrary to the Act nor has it permitted unlawful free forwarding by carriers. Petitioner (Brief, pages 25-29) and the intervenor, National Customs Brokers & Forwarders Association of America, Inc. (hereinafter "National Association"), (Brief, pages 3-13), both contend that the amendment to Rule 510.22(a) which is here for review unlawfully purports to authorize common carriers by water to perform

* This point is submitted on behalf of Far East Conference only.

freight forwarding services free of charge. Only the National Association (Brief, pages 14-17) contends that the Commission's purported authorization of unlicensed forwarding by common carriers by water—whether gratis or for a fee—is contrary to the licensing statute, Section 44 of the Act. Both contentions attribute to the Commission's rule a broader sweep than is warranted by an informed reading of it, and the latter contention utterly reverses the thrust of a statute designed to overcome evils found to exist in the forwarding industry, and not to grant to the forwarding industry the right to impose services—and charges—even when its services are unwanted.

A. Section 44 of the Shipping Act Does Not Require Carriers to Be Licensed in Order to Perform Functions Prerequisite to Lifting and Carrying Cargoes.

The National Association (Brief, page 15) points to the language of Section 44(a),[1] which forbids unlicensed persons to "engage in carrying on the business of forwarding as defined in this Act", as precluding the Commission from issuing a rule which contemplates that an ocean carrier may, with respect to cargoes which it has contracted to carry, do for itself acts which are often performed by freight forwarders and which are essential to enable the carrier to perform its contract of carriage. The Association says that there can be no distinction between "carrying on the business of forwarding" and performing freight forwarding services without a license. This simplistic assertion is, on its face, illogical, and it is contrary to the facts of ocean

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[1] "No person shall engage in carrying on the business of forwarding as defined in this Act unless such person holds a license issued by the Federal Maritime Commission to engage in such business: *Provided, however,* That a person whose primary business is the sale of merchandise may dispatch shipments of such merchandise without a license."

commerce as the Commission, in its *expertise,* might be expected to know them.

At the outset, it must be understood that the forwarders occupy a dual position. This has been recognized in all of the Commission's decisions to which the petitioner and the National Association refer, and it was the subject of extensive and searching inquiry in the "Investigation into the Activities of Foreign Freight Forwarders and Brokers," *Hearings Before the Special Subcommittee on Freight Forwarders and Brokers of the Committee on Merchant Marine & Fisheries, House of Representatives,* 84th Cong., 1st and 2d Sess. (1955-1956) ("House Forwarders' Investigation"). The forwarder is engaged by a shipper of parcels to be dispatched by a common carrier by water in foreign commerce. He may render one or more of a wide spectrum of services for the shipper. He may also, in connection with the shipment, perform one or more of a substantial number of services which benefit the carrier and which, indeed, may be indispensable in order for the carrier to load and transport the shipper's goods. For the services from which the carrier benefits, the carrier in many foreign trade routes pays compensation to the forwarder which, prior to the enactment of the forwarder licensing law in 1961, was denominated "brokerage".

The House Forwarders' Investigation was conducted to look into allegations against the forwarding industry which were contained in a report issued by the General Accounting Office (House Forwarders' Investigation, page 1). Among the subjects of inquiry, which ranged from the propriety of the postwar application of a statute designed to assist the forwarders in surviving loss of revenue from the curtailment of trade during the war, to the propriety of "dummy forwarders" used by merchants to secure an indirect reduction of their freight charges by the collection

of brokerage from the carriers, was included the general question of the propriety of the payment of brokerage under some or all circumstances.

The forwarders' representatives who testified at the investigation strongly claimed that many of their operations were not only necessary and convenient, but even prerequisite to the lawful carriage of cargo in foreign commerce. Thus, Martin A. Kerner, president of the Customs Brokers & Forwarders Association of America, Inc., pointed out (House Forwarders' Investigation, pages 722-3) that the preparation of many documents by the forwarder, such as the bill of lading, the export declaration, consular documents required by the foreign country of destination, etc., is of benefit to the carrier. He paraphrased the United States Government Regulations (*id.* at 705) which require export declarations and licenses to be lodged with the Collector of Customs and duly authenticated before the merchandise is delivered to the carrier, who may not accept the cargo until he receives the authenticated copy of the export declaration. This testimony was confirmed by, among others, James A. Dennean, then Chairman of the Far East Conference (*id.* at 485).

In their desperate scramble to protect their right to collect brokerage, which was under serious threat from 1947 until the enactment of the licensing bill in 1961, the forwarders proved too much to enable them now to claim that everything that they do can be done by them alone, or that a carrier cannot do some of those functions for itself.

It should be clearly understood, as stated by the Commission in the decision supporting the rules here under attack, that the carriers do not want to engage in the business of forwarding. What they do want is to be able to do at least some of the things which forwarders usually do in

many trades and which must be done in order for the carrier lawfully to carry cargo in accordance with his contract with the merchant. This, the carrier wants to be able to do, without having to comply with a licensing statute designed to govern a type of enterprise utterly different from the carrier's. This freedom is desired so that the carrier may do the necessary when the shipper has not engaged a forwarder and is not in a position even to prepare a bill of lading or make up an export declaration and lodge it with the appropriate collector of customs. When the carrier takes care of these, and other ministerial details, he is not in any sense dispatching the shipment of another via a common carrier; he is merely doing what he must in order to fulfill an undertaking to carry which he has already contracted.

At the House Forwarders' Investigation, Mr. Kerner came forward with a proposed draft of a forwarder licensing bill (*id.* at 710-11), and in that proposal, paragraph (a) contained a provision that "Except as provided in subdivision (c) of this Section, no person shall transact business as a foreign freight forwarder without a license," but that nothing in the section required a license in the case of a person forwarding his own merchandise for his own account. Subdivision (c) set forth a provision for "grandfather rights".

Subdivision (a) provided for the licensing of "independent foreign freight forwarders". Subdivision (e)(1) defined an independent foreign freight forwarder as "any person engaged in the business of dispatching shipments on behalf of other persons, for a consideration, by oceangoing vessels in the commerce from the United States * * * to foreign countries * * *; *but who is not a* shipper, or a consignee, or a seller, or purchaser, or *common carrier by water of such shipments* * * * nor directly or indirectly con-

trols or is controlled by the shipper or consignee, common carrier by water, or * * *. [Emphasis added.]

That this combination of the requirement of a license and a definition of persons eligible for licenses was intended to preclude common carriers by water from engaging in the business of forwarding was confirmed by Mr. Kerner in his testimony (*id.* at 724-5).

That this overreaching by the forwarder industry was rejected by Congress when it did enact the forwarder licensing legislation in 1961 is conclusively demonstrated by the definition of "independent ocean freight forwarder" which was added to Section 1 of the Act by P. L. 87-254. The exclusions from the definition, which closely parallels the language of Mr. Kerner's proposal, are limited to a person "who is not a shipper or consignee or a seller or purchaser of shipments to foreign countries, nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by such shipper or consignee or by any person having such a beneficial interest". The omission of common carriers by water from the exclusionary language is eloquent.

We submit that the Commission's rule set forth in Rule 510.22(a) is entirely lawful, reasonable and proper in contemplating that common carriers by water may perform, in their own interest and in connection with shipments which they have contracted to carry, services which on other occasions may be performed by forwarders and compensated by the carriers.

B. The Commission's Rule Quite Properly Contemplates That Carriers May Perform Forwarding Services Without Charge in Connection With Cargoes Carried by Them.

As we have pointed out above, the forwarders have repeatedly contended that many of their services are of benefit to the carriers as well as to the shippers who employ the forwarders and that some of them, such as preparation of the bill of lading and of the export declaration, are, in former case, an obligation of the carriers and, in the latter case, prerequisite to the acceptance and loading of the cargo. We have also pointed out that many carriers and their representatives agreed with the forwarders' contention in this regard.

This proposition appears to have been accepted as the basis for Section 44(e) of the Act, as amended in 1961, which clearly authorizes carriers to compensate licensed forwarders provided that certain minimum services have been rendered with respect to the shipment in question. That it was contemplated that those services were benefits to the carriers is indicated by the language authorizing such compensation "to the extent of the value rendered such carriers". Those services include, in addition to some participation in the connection between the cargo and the ship, the following:—

(1) The coordination of the movement of the cargo to shipside;

(2) The preparation and processing of the ocean bill of lading;

(3) The preparation and processing of dock receipts or delivery orders;

(4) The preparation and processing of consular documents and export declarations;

(5) The payment of the ocean freight charges on such shipments.

It would appear to be indisputable that if no forwarder participates in a shipment and the carrier performs for itself one or more of the functions for which it would be legally authorized to compensate a forwarder, the carrier should be entitled to make no charge to his shipper-customer for the performance of that service. There can be no question of the burdening of other traffic with the cost of performing the service since, under the circumstances supposed, the carrier will not have to pay forwarder compensation which it might pay if a forwarder had been involved.

It may be noted that the Commission has not put its *imprimatur* on all instances of the rendering of free forwarder services by carriers. It has provided that the carriers must specify in their tariffs such services as they are willing to perform free and has selected as illustrative the presentation of executed shippers' export declarations to customs authorities—which is No. 4 among the services for which forwarders may be compensated by carriers and which was mentioned in House Forwarder Investigation as a service essential in the carriers' interest. The Commission has not indicated that it would countenance the free rendition by carriers of any and all freight forwarding services. If and when an instance occurs in which a carrier renders a forwarding service which is exclusively of benefit and value to the shipper, and makes no charge therefor, the Commission's rule would be no bar to the taking of corrective action. Parenthetically, it may be noted that the inclusion in amended Rule 510.22(a) and amended Rule 510.24(f) of the requirement that carriers' tariffs specify the forwarding services which the carrier is willing to perform and the charge therefor, if any, should assist the Commission in promptly

spotting any intention of a carrier to render gratis services for which a charge properly should be required.

The specter of unfair free carrier competition is the product of a lively imagination. The great preponderance of the carriers value the forwarders' intervention between them and their patrons and the economies which those carriers feel they can achieve by leaving certain functions to forwarders and compensating them as authorized by the statute. Those carriers have repeatedly so testified and have supported the forwarders in their resistance to efforts to cut off their right to compensation from carriers. However, there are minor instances in which shipments are lifted at ports which do not generate sufficient business to support an independent foreign freight forwarder. There are also some instances in which a shipper does for himself the acts which are required of him and does not engage a forwarder to act on his behalf. In those cases, if the carrier is willing to do so, it should be unquestionably lawful for it to do, without charges to any one, what is necessary to complete the process of export shipment.

2. *Rule 510.23(f)—The Payover Rule*

The amended Payover rule in issue here, Section 510.23(f), merely requires that a freight forwarder who has received money from his principal to pay ocean freight charges actually make payment to the carrier within a specified time. A payover rule first appeared in Subpart B of General Order No. 4, the first body of regulatory rules promulgated by the Commission under the authority of Section 44(c) of the Act. Subpart B was promulgated on May 1, 1963, on the basis of a Commission rule-making proceeding, Docket 973, 28 F.R. 4300. The original rule required the forwarder to "promptly pay" to the carrier,

and others, monies received from his principal for the payment of freight and other charges incurred in making a shipment. This rule was not challenged by the Petitioner in its earlier attack on General Order 4, *New York Foreign Freight Forwarders and Brokers Association, Inc.* v. *F.M.C., supra.*

The considerations underlying the promulgation of the amended rule were debated at length in the Commission's rule-making proceeding. The Commission's proposed version of the amended rule called for payover of freight charges within five days after a forwarder received money from his principal for the payment of charges, or within three days of the vessel's sailing, whichever was later. In its opening comments (Item 8 of the Record on Appeal) the Petitioner argued that the rule would create hardship for forwarders because it would substantially add to their bookkeeping burdens. A forwarder, it was contended, would be obliged to issue a "multiplicity of checks" to make each freight payment five days after the money was received from his principal, and would also be subjected to the task of keeping precise accounts of the dates when monies were received from his principal for payment of freight (Jt. App. 58-59).

The Petitioner did not at that time challenge the Commission's power to promulgate the rule. Indeed, it indicated an "agreement in principle" with the establishment of a payover requirement (Jt. App. 58), and suggested variations which would be acceptable to the forwarding industry (Jt. App. 60). The Petitioner's comments indicated that any rule would be better than one prohibiting a forwarder from using as his working capital money advanced by his principal for payment of freight charges. (Jt. App. 58).

The Intervening Conferences and the Commission's staff presented comments which ranged from a condemnation of some forwarders' practice of withholding payment of freight as "wrong" (Jt. App. 61), to the observation by the Commission's Hearing Counsel that the money in question does, after all, belong to the carrier, and is held by the forwarder in trust for his principal. (Jt. App. 63).

In the second round of comments, the Petitioner attempted to debunk the carrier's experience of losses attributable to the bankruptcy of withholding forwarders, and reiterated its arguments about a "multiplicity of checks." (Jt. App. 64-65). The Petitioner also raised the argument that the five day period did not give sufficient time for checks received from the principal to clear, and thus exposed the forwarder to the risk that his payments to the carrier would not be covered by sufficient funds. (Jt. App. 66). For the first time, the Petitioner challenged the authority of the Commission to promulgate the rule, on the sole ground that Section 17 of the Act was not broad enough to cover the practices of forwarders connected with the payment of freight. (Jt. App. 68). Information submitted by the Conferences indicated that the time limits were adequate. (Jt. App. 73-74).

The Commission, after considering the comments on the proposed rules and hearing oral argument, amended the rule to require payover within the later of seven days after receipt of the monies or five days after the sailing of the vessel, excluding Saturdays, Sundays and legal holidays. The revision accommodated the Petitioner's fears that the time period originally proposed was too short to assure collection of the funds advanced by a principal.

The Commission also pointed out that the "multiplicity of checks" argument was fallacious because a single check

could be issued to cover all freight payments received by the forwarder before the expiration of the deadline for payover. The Commission also noted that the argument was irrelevant because the carrier is entitled to be paid without delay, and the forwarder, because of his fiduciary obligation, is not privileged to use for his own purposes, even temporarily, money advanced by his principal. See *Fugazy Travel Bureau, Inc.* v. *C. A. B.*, 121 U.S. App. D.C. 355, 350 F.2d 733 (1965).

The record, then, makes clear the factual basis for the rule and the interests that were balanced by the Commission before its promulgation. Procedurally, the Commission discharged its rule making function in accordance with the principles set forth in the APA.

The statutory basis of the rule is equally evident. Section 44(b) of the Act establishes the necessary qualifications of those who would be licensed freight forwarders. They must be "fit, willing and able properly to carry on the business of forwarding, and to conform to the provisions of this Act and the requirements, rules, and regulations of the Commission issued thereunder." The Commission is directed to make a finding to this effect before issuing a license to an applicant. Under this provision, the Commission has the duty and the concomitant power to define who is "fit, willing and able" and how the business of freight forwarding is "properly" carried on, and to assure that such standard of conduct is observed.

In the past the Commission has defined these standards on a case-by-case basis. For example, in *Application for Freight Forwarding License—Dixie Forwarding Co., Inc.*, 8 F.M.C. 109 (1964), the Commission found the applicant to be unfit to carry on the business of freight forwarding because he had engaged in "lax financial practices," among

them delay in paying over to the carrier freight monies advanced by his principal. This delay, said the Commission, indicated a lack of the degree of business responsibility and integrity required of one who would act in the fiduciary capacity of a forwarder. The Commission emphasized the testimony of one shipper who had suffered harm from the applicant's failure to make timely payment of freight charges to the carrier, *id.*, at 115, and noted that forwarders were responsible for proper disposition of large amounts of other people's money. *Ibid.* Noting that a forwarder's position between shipper and carrier gives him "enormous" competitive and economic power, the Commission cited a forwarder's capacity to do great harm to both by failing to pay freight charges for which funds have been advanced by his principal, *id.*, at 116.

The Commission, then, has always considered prompt payover to be an element of the "fit, willing and able" standard. In the rule-making proceeding the Commission reiterated its concern, expressed earlier in the *Dixie Forwarding Co.* case, *supra,* that delay in payover could result in substantial losses to carriers and shippers (Jt. App. 69). The Petitioner has never questioned this interpretation of the statute. The Commission's original rule, calling for prompt payover, was never challenged; indeed, it seems to be accepted by the Petitioner. The only real issue raised by the Petitioner in challenging the present version of the rule is whether the statute authorizes the Commission to establish precise, rather than general, standards of fitness for forwarders. In other words, can the Commission by rule define what constitutes being "fit, willing and able properly to carry on the business of freight forwarding"?

The Commission must under Section 44(b) make a finding as to each applicant that he meets (or fails to meet) the statutory standard. This procedural requirement, however,

does not preclude the Commission from establishing general standards under its rule making power. Where, as here, failure to live up to the standard can result in the revocation of a license under Section 44(d), the case-by-case method of prescribing standards bears heavily on those forwarders who have the misfortune to violate a hitherto vaguely defined duty. See, *e.g.* the dissent of Commissioner Stakem in the *Dixie Forwarding Co.* case, *supra,* at 119-120. As this Court has pointed out, use of its rule making power by the Commission is an appropriate means to lay down precise definitions of statutory standards. *Pacific Coast European Conference, et al.* v. *F. M. C., supra.* That an administrative agency has the discretion to choose the one method of defining standards, rather than the other, there can be no doubt. See *Philadelphia Television Broadcasting Co.* v. *F. C. C.,* 123 U.S. App. D.C. 298, 359 F.2d 282 (1966); and *American Airlines, Inc.* v. *C. A. B., supra.* Here the Commission chose, and chose wisely, to define by rule the standards imposed on forwarders by the Act.

3. *Rule 510.24(a)— Disclosure of Shipper's Name on the Bill of Lading*

Amended rule 510.24(a), like the payover rule, changes an earlier rule which did not adequately serve the regulatory purpose for which it was intended. The original rule prohibited the payment of brokerage by a carrier and its receipt by a forwarder unless the name of the actual shipper of the cargo was disclosed on the "line copy" of the bill of lading—the copy retained by the carrier in its own files.

The original version of what became the "line copy" rule proposed in Commission Docket 973, *supra,* provided, as does the recent amendment in issue here, that the shipper's name be disclosed on all copies of the bill of

lading and not merely on the "line copy". This proposed rule was criticized by the Petitioner on the ground that full disclosure of a shipper's identity might subject the shipper to some undefined competitive hardship. The Commission at that time deferred to the Petitioner's conclusory claims of hardship and required disclosure only on the "line copy." Because the "line copy" rule proved unsatisfactory in that it did not enable the Commission to obtain the information it was seeking, the present rule was proposed by the Commission.

Petitioner, in attempting to establish that the new rule is arbitrary and unfair, has ignored the valid regulatory purpose of the rule. Specifically, Petitioner argues that the new rule is unnecessary, and therefore unfair and arbitrary, because the existing "line copy" rule (which it does not challenge) is adequate to obviate any "conceivable danger . . . of unlawful rebating." The rebating carrier itself, the argument goes, will, under the "line copy" rule, detect and confess its own violations of the Act; and more effective policing, therefore, is unjustifiable. (Jt. App. 76-77). The Petitioner's counsel has acknowledged expressly what is implicit in the foregoing argument, that the "line copy" rule served a legitimate regulatory purpose. (Jt. App. 70-71). Secondly, the Petitioner boldly asserts that the Commission's attempt to "lend a measure of integrity to lawful dual rate contracts" (Jt. App. 72) is not a valid regulatory purpose, and that the existence of this "invalid" purpose somehow destroys the recognized valid statutory foundation for the rule. (Jt. App. 71).

The Commission stated in its order promulgating this rule that its primary concern was the prevention of unlawful rebates disguised as payments of brokerage to forwarders. This is a valid regulatory purpose, and is, moreover, no new concern on the part of the Commission. The

purpose of the rule proposed in Docket 973, *supra,* as of the amendment in issue here, was "to enable carriers and the Commission to determine promptly whether direct or indirect rebates were being made to shippers through freight forwarders." (Jt. App. 71-72). The shortcoming of the "line copy" rule was that a search of the carrier's records would be necessary to enable the Commission and other carriers to uncover instances of unlawful rebates.

Indeed, it is questionable whether such a search would even be possible in some cases, because of the notorious reluctance of foreign-flag carriers to open their files to the Commission's scrutiny. In operation, the line copy rule might well give some measure of power over American-flag carriers, and none whatever over their foreign-flag competitors. Such a result is, of course, to be avoided. See *Alcoa Steamship Co.* v. *U.S., supra.*

There is no question that the practices which the Commission seeks to inhibit by promulgating this rule are unlawful. It is unlawful for a person shipping on his own account to obtain brokerage payments on the pretense that he is a freight forwarder. Brokerage paid under such circumstances is an unlawful rebate. (See Section 1 and Section 44(e) of the Act.) Moreover, a person who ships for his own account is not an independent ocean freight forwarder within the meaning of the Act as to such shipments and is not entitled to forwarder's compensation from carriers except as to shipments dispatched on behalf of other unrelated persons. The rule is intended to discourage unlawful practices. This is conceded by Petitioner, whose counsel acknowledged the Commission's power both to require a forwarder to indicate that he is not actually a shipper in order to keep his license and to require disclosure of the shipper's identity in order to prevent rebates. (Jt. App. 70-71).

The rule also has the effect of enabling the Commission to carry out its duty more effectively under Section 14b of the Shipping Act to assure that dual rate contracts used by carriers and conferences do not operate in a manner that is unfair as between shippers. This, too, is a valid regulatory purpose.

It was generally conceded in this proceeding that freight forwarders on occasion lend themselves to violation of dual rate contracts by shippers. Petitioner's counsel so conceded at the oral argument (Jt. App. 72), as did the representative of Viking Line (Jt. App. 74).

The Commission, as the regulatory agency charged with the administration of all the provisions of the Act, is empowered to assure that forwarders do not become parties to schemes to frustrate the objectives of the dual-rate law, Section 14b of the Act. The Commission, moreover, must take steps to assure dual rate contracts in effect under the provisions of Section 14b are not in any way detrimental to the commerce of the United States or unjustly discriminatory and unfair as between shippers. The Commission is empowered under Section 14b to withdraw approval of any such contracts when it finds that they no longer satisfy its standards. Schemes to avoid such a contract place those shippers who abide by its terms at a disadvantage in their competition with those shippers who utilize the schemes. Moreover, such a contract is certainly not the "fair and effective" contract that the preamble to P. L. 87-346, the law which legalized dual rate contract systems, indicates that Congress wished to validate.

4. *Rule 510.24(f)—Publication of Brokerage Rates*

The Commission, by this rule, has required carriers and conferences to disclose in their tariffs the amount of brokerage which they will pay to freight forwarders. The for-

warders challenge the statutory authority of the Commission to promulgate this regulation, principally on the ground that it is predicated on the arrogation by the Commission of the power to oversee the level of brokerage paid by carriers to forwarders. The level of brokerage is in the Petitioner's opinion, "of no regulatory concern" to the Commission. (Petitioner's Brief, p. 47)

The Petitioner argues that the rule is an effort by the Commission to obtain indirectly full regulatory power over the level of brokerage paid by carriers to forwarders. The fallacy in the Petitioner's argument is that the Commission's rule in no way implies that the Commission is attempting to assert general regulatory power over the level of brokerage rates. Indeed, the Commission disclaims any such intention. The Commission's power is limited to the power to act in cases in which the amount of brokerage paid exceeds the value of the services rendered. The purpose and effect of the rule is not to impose more extensive regulation or in any way affect the level of brokerage payments. The Commission was careful in promulgating the rule to see that it would not be subject to this objection. The Commission's order emphasizes that

> "No one is compelled under this amendment to pay brokerage for services not performed nor is it designed to defeat attempts by carriers to compete with one another by paying different levels of brokerage or varying such levels according to the services performed." (Jt. App. 18).

In order to permit the highest degree of flexibility in adjusting brokerage rates, the Commission has made it clear that no notice need be given of a change in the level of brokerage. *Ibid.* Complete flexibility can be retained even though brokerage rates are filed in a tariff. This is demonstrated by the fact that most conferences already

publish their brokerage rules and regulations in their tariffs without injury to their ability to compete. *Id.*, at 17.

Petitioner's blanket assertion that the level of brokerage is of no concern whatever to the Commission perceives the Commission's duty and power with respect to the level of brokerage too narrowly. Section 44(e) provides that brokerage shall be limited "to the extent of the value rendered" by the forwarder to the carrier in connection with any shipment. This statutory language is grounded in a long history of criticism of the level of brokerage payments. H.R. 2488, *supra,* as reported by the Committee and passed by the House contained language identical to that set forth in Section 44(e) of the Act. The bill as originally submitted to the Committee limited payment of brokerage to 5%. The reported bill, however, replaced this limitation with the broader "extent of the value rendered" standard. The Committee acted after hearing testimony from the carriers that the historical brokerage fee of 1¼% was acceptable to them. The Committee report states:

> "Accordingly, the 5-percent maximum was deleted from the bill as hereby reported with the understanding that the Federal Maritime Commission would oversee the reasonableness of brokerage in the light of services rendered." H. Rep. No. 1096, 87th Cong., 1st Sess. 3 (1961).

The Report went on to say that the bill was not necessarily intended to reduce the historical brokerage fee of 1¼% but rather to assure that the brokerage to be paid should always reflect the reasonable value of the forwarder's service. *Id.*, at 3. The House of Representatives, therefore, expressly admonished the Commission to oversee the level of the brokerage and stated that it was its understanding that brokerage would at all times be no more than reasonable.

The Senate, whose bill did not differ from the final version of H.R. 2488 in this respect, took a similar view. In declining to set a level of brokerage, the Senate stated that it preferred that

> "... the amount of the brokerage which carriers or conferences thereof pay is a matter which, like the fixing of ocean freight rates, has been and we think, should continue to be left to free enterprise determination. Such determination must be subjected to the Board's vigilant enforcement of pertinent provisions of the Shipping Act, 1916, as amended by this Act, and all other applicable laws. In our opinion, an element of elasticity is necessary in order to meet ever-changing needs of international shipping serving the foreign commerce of the United States." S. Rep. No. 691, 87th Cong., 1st Sess. 5 (1961)

It was clearly the intent of both Houses of Congress, therefore, that the Commission should exercise its regulatory function to assure that brokerage fees paid by carriers should not exceed "the extent of the value rendered" to the carrier by the forwarder.

Moreover, the Commission's interest in brokerage payments is not limited to its function to prevent violations of Section 44(e) of the Act. The investigations which the Commission conducted prior to the passage of Section 44 disclosed that the receipt of brokerage by forwarders from carriers often constituted direct or indirect rebates in violation of Section 16 of the Act. S. Rep. No. 691, *supra,* at 3. The Commission has the power and duty to prevent such rebates.

In order to carry out these regulatory functions, the Commission must be informed as to the level of brokerage being paid by carriers. The rule enables the Commission to

obtain the necessary information. It must be conceded that the Commission has available to it a number of procedural devices which it could use to do the job. It could, for example, require carriers under Section 21 of the Act to prepare periodic reports setting forth the level of brokerage fees paid by them. The Commission also could conduct investigations from time to time. It could also allege violations and conduct formal adjudicatory proceedings under Section 22. In the latter instances its Section 27 subpoena power would be available. The Commission has, by this rule, taken a much more direct route by requiring the carriers to disclose publicly what level of brokerage they pay.

Public disclosure serves a number of additional purposes that might not be as well served by the other alternatives available to the Commission. First, it enables a forwarder to ascertain the level of brokerage being paid to his competitors, and thus discourages favoritism and preference. Second, disclosure enables the forwarder's principal to know how much his agent is receiving in exchange for shipping his cargo on a particular carrier's vessel. Many considerations ought to go into a forwarder's determination of which carrier to use: the carrier's schedule, the ability to handle the cargo in question without loss or damage, responsibility in responding to claims, physical security, and many more. What is in the best interest of the shipper, however, is not always in the best interest of the forwarder. The forwarder, for example, will undoubtedly have a strong motive to select the carrier which pays the highest brokerage, regardless of its suitability for a particular shipment. In the area of selection of the carrier, therefore, the forwarder's interests do not always coincide with those of his principal. Publication in the tariff of the applicable brokerage rate will enable the principal to decide for himself whether the forwarder was motivated by self-interest rather than the interest of his principal.

The rule adopted by the Commission, it is submitted, carries out all of these purposes in a way that no single alternative procedure could do. Section 43 of the Act, which grants to the Commission the power to adopt rules and regulations to carry out the provisions of the Act, gives to the Commission the power to choose a regulatory device that is suited to effectuating the purposes of the Act. *New York Foreign Freight Forwarders and Brokers Association, Inc.* v. *F.M.C.*, 337 F.2d 280 (2d Cir. 1964). This is precisely what the Commission has done here.

Finally, it is argued by Petitioner that this rule requires carriers to include in their tariffs information which is not required by Section 18(b) of the Act and that the rule is, therefore, beyond the Commission's power. This argument is wrong on two counts. First, Section 18(b)(1) of the Act, which requires carriers' tariffs to "state . . . such terminal or other charge . . . which is granted or allowed . . . ", posits Commission authority to promulgate such a regulation, which, in effect, defines what terminal charges are. Thus, In *I.C.C.* v. *Detroit, Grand Haven & Milwaukee Ry. Co.*, 167 U.S. 633 (1896) (dictum) the Court observed that in determining what could be required to be included in a carrier's tariff under the heading "terminal charges" much should be left to the judgment of the Commission. It could be reasonable, said the Court, for the I.C.C. to prescribe that a free carting service furnished by a carrier should be regarded as a terminal charge and, as such, included in the tariff, even though the applicable statute might not expressly require it.

Even this view, however, confines the Commission's power too narrowly. Section 18(b) of the Act sets forth what must be included in a carrier's tariff, but it does not purport to be exhaustive and to limit the power of the Commission to

require publication of information in the tariff as one of the means by which its lawful regulatory functions can be carried out.

CONCLUSION

For the foregoing reasons, the rules under review are within the authority of the Federal Maritime Commission and constitute a reasonable exercise of that authority in relation to the Commission's statutory duties under the Shipping Act; and, accordingly, the rules should be determined to be lawful and valid, the petition should be denied, and the interlocutory injunction issued herein should be dissolved.

Respectfully submitted,

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APPENDIX A

Intervening Conferences and Their Member Lines

Conferences

Atlantic & Gulf/Panama Canal Zone, Colon & Panama City Conference
Atlantic & Gulf/West Coast of Central America & Mexico Conference
Atlantic & Gulf/West Coast of South America Conference

East Coast Columbia Conference
East Coast South America Reefer Conference

Far East Conference

Havana Steamship Conference

Leeward & Windward Islands & Guianas Conference

North Atlantic Baltic Freight Conference
North Atlantic Continental Freight Conference
North Atlantic French Atlantic Freight Conference
North Atlantic Mediterranean Freight Conference
North Atlantic United Kingdom Freight Conference

River Plate and Brazil Conferences

Santiago de Cuba Conference

United States Atlantic & Gulf-Haiti Conference
United States Atlantic & Gulf-Jamaica Conference
United States Atlantic & Gulf-Santo Domingo Conference
U. S. Atlantic & Gulf-Venezuela and Netherlands Antilles Conference

Appendix A

Member Carriers

Alcoa Steamship Company, Inc.
American Export Isbrandtsen Lines, Inc.
American President Lines, Ltd.
Anchor Line, Ltd.
A. P. Moller-Maersk Line
Atlantic Lines, Ltd.
Azta Shipping Co.

Belgian Line—Joint Service
Black Diamond Steamship Corporation
Blue Sea Line—Joint Service
Booth-Lamport West Indies Service—Joint Service
Booth Steamship Company, Ltd.
Bristol City Line of Steamships, Ltd.
Brodin Line—Joint Service

Chilean Line (Compania Sud Americana de Vapores)
Coldemar Line (Compania Colombiana de Navegacion Maritima, Ltda.)
Columbus Line (Hamburg-Suedamerikanische Damfschifffahrts-Gesellschaft Eggert & Amsinck.)
Companhia de Navegacion Lloyd Brasileiro
Concordia Line—Joint Service
Constellation Line (Van Nievelt, Goudriaan & Co. Stoomvaart Maatschappij)
Cosmopolitan Line (A/S Ludwig Mowinkels Rederi)
Cunard Steam-ship Company, Limited, The

Delta Steamship Lines, Inc.
Dominican Steamship Line (Flota Mercante Dominicana, C. por A.)

Empresa Lineas Maritimas Argentinas (ELMA)

Appendix A

Fabre Line
Fern-Ville Line—Joint Service
Finnlines (Merivienti Oy)
First Atomic Ship Transport, Inc. (American Export Isbrandtsen Lines)
French Line (Compagnie Generale Transatlantique)
Fresco Line—Joint Service
Furness Warren Line

Gdynia American Line
Grace Line Inc.
Grancolombiana (Flota Mercante Grancolombiana S.A.)
Gulf & South American Steamship Co., Inc.

Hamburg-American Line (Hamburg-Amerika Linie)
Hansa Line
Hellenic Lines, Ltd.
Holland-America Line (N.V. Nederlandsche Amerikaansche Stoomvaart-Maatschappij)
Holland Pan-American Line (Van Nievelt, Goudriaan & Co. Stoomvaart Maatschappij)

Irish Shipping Limited
Isthmian Lines, Inc.
Italian Line (Italia Societa per Azioni de Navigazione)
Ivaran Lines (Aktieselskapet Ivarans Rederi)

Japan Line, Ltd.
Johnson-Warren Lines, Ltd.

Kawasaki Kisen Kaisha, Ltd.

Lamport & Holt Line, Ltd.
Lykes Bros. Steamship Co., Inc.

Mamenic Line (Marina Mercante Nicaraguense, S. A.)
Manchester Liners, Ltd.

Appendix A

Maritime Company of the Philippines, Inc.
Mitsui-O.S.K. Lines, Ltd.
Montemar Line, S.A., Commercial y Maritima
Moore-McCormack Lines, Incorporated

National Hellenic American Line, S.A.
Nippon Yusen Kaisha, Ltd.
North German Lloyd (Norddeutscher Lloyd)
Northern Pan-America Line, A/S (NOPAL Line)
Norton Line—Joint Service
Norwegian American Line (Den Norske Amerikalinje A/S Oslo)

Orient Mid-East Lines

Peruvian State Line (Corporacion Peruana de Vapores)
P.N. Djarkata Lloyd
Polish Ocean Lines (Gdynia American Line)
Prudential Lines, Inc.

Royal Netherlands Steamship Company (Koninklijke Nederlandsche Stoomboot Maatschappij)

Sea-Land Service Inc.
Sea-Land Joint Service
States Marine Lines—Joint Service
Swedish American Line-Swedish Transatlantic Line—Joint Service

Torm Lines (Dampskibsselskabet Torm A/S)

Ulster Steamship Company, Ltd. (Head Line and Lord Line)
United Fruit Company
United Philippine Lines, Inc.
United States Lines, Inc.

Appendix A

Venezuelan Line (Compania Anonima Venezolana de Navegacion)

West Coast Line, S.A.

Wilhelmsen Lines—Joint Service

Yamashita-Shinnihon Steamship Co., Ltd.

Zim Israel Navigation Co., Ltd.

Certificate of Service

I, John R. Mahoney, an attorney of record for the Intervening Conferences herein, do hereby certify that on May 31, 1967, I served a copy of the Joint Brief for the Associated Latin American Freight Conferences, et al. and Far East Conference and their Member Lines upon the following:

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by mailing a copy, via first class mail, postage prepaid, to each of them at the addresses beneath their respective names.

John R. Mahoney

New York, New York
June 12, 1967

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,868

NEW YORK FOREIGN FREIGHT
FORWARDERS AND BROKERS ASSN.,

Petitioner,

v.

FEDERAL MARITIME COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

ON PETITION TO REVIEW AN ORDER OF
THE FEDERAL MARITIME COMMISSION

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QUESTIONS PRESENTED

1. Did the respondent Federal Maritime Commission act within the scope of its statutory authority in promulgating its General Order 4, Amendment 10?

2. Was the aforesaid order arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law?

3. Was the aforesaid order required to be and was it supported by substantial evidence?

4. Was the aforesaid order contrary to constitutional right, power, privilege or immunity?

INDEX

TABLE OF AUTHORITIES

* Cases principally relied upon.

STATUTES — PAGES

Other Authorities Cited

COUNTERSTATEMENT OF THE CASE

This is a petition to review a final order of the Federal Maritime Commission (Commission) issued and served on October 19, 1966, pursuant to the Shipping Act, 1916, c. 451, 39 Stat. 728, as amended, 46 U.S.C. §801 et seq. (Act). The order was issued in the Commission's Docket No. 66-31 and promulgated amendments to General Order 4, 46 C.F.R. Part 510 which set forth regulations affecting the licensing of independent ocean freight forwarders. Jurisdiction to review the Commission's order is conferred on this court by 28 U.S.C. §2341 et seq.

Ocean freight forwarders are employed by shippers or consignees to dispatch their shipments and perform other incidental services. For example, forwarders customarily secure cargo space, prepare shipping documents and make insurance arrangements. While these functions have been generally recognized as valuable, certain acitivities of the forwarding industry have been investigated and found objectionable. Among the more significant abuses were (1) the so-called "brokerage" payments which the forwarders had, for many years, more or less automatically received from ocean carriers regardless of whether such payments were warranted, and (2) the methods employed by forwarders to bill charges to their shipper clients. See, e.g., Port of New York Freight Forwarder Investigation, 3 U.S.M.C. 157 (1949); Investigation of Practices, Operations, Actions, and Agreements of Ocean Freight Forwarders and Related Matters, 6 F.M.B. 327 (1961); United States v. American Union Transport, Inc., 327 U.S. 437 (1946). See also, H.R. Rep. No. 2939, 84th Cong., 2d Sess. 7, 14 (1956); H.R. Rep. No. 2333, 85th Cong. 2d Sess., 13 (1958); S. Rep. No. 691, 87th Cong., 1st Sess., 4 (1961); H.R. Rep. No. 1096, 87th Cong., 1st Sess., 2-3 (1961).

In the Port of New York Freight Forwarder Investigation, supra, the Commission found that forwarders had been concealing in their billings markups of varying degrees over and above out-of-pocket expenses incurred for accessorial services such as insurance. In addition, the investigation revealed that many shippers had been collecting "brokerage" from carriers by holding themselves out as forwarders, and tnat forwarders who had beneficial interests in shipments had been accepting brokerage fees on them. Id. at 163-64. The latter practices amounted to rebates in violation of section 16 of the Shipping Act, 46 U.S.C. §815, and the Commission's predecessor, the Federal Maritime Board, in 1950 issued regulations to correct the situation. (General Order 72, 15 Fed. Reg. 3153.)

Later, the Board, after further investigation, found a continuation of the same abuses and concluded that the 1950 regulations had been "ineffective in preventing rebates." Investigation of Practices, Operations, Actions and Agreements of Ocean Freight Forwarders and Related Matters, supra, at 349-51. It therefore revised and strengthened the regulations generally and, in addition, placed an absolute prohibition on the payment of "brokerage" to forwarders by carriers. Id. at 368, 371.

As a result of the Board's total prohibition against brokerage payments from carriers to forwarders, Congress was urged by the forwarders to enact mitigating legislation. In response, Congress passed the Freight Forwarder Law of 1961, 75 Stat. 522,[1/] which allowed the payment of brokerage compensation

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1/ P.L. 87-254, 87th Cong., 1st Sess. (Sept. 19, 1961), 46 U.S.C. 841b.

under certain conditions (e.g., when a licensed forwarder actually booked ship space for the cargo, prepared the bill of lading, and paid freight charges) and authorized the Commission to "prescribe reasonable rules and regulations." In favorably reporting the bill, the Senate Commerce Committee stated:

> "We recognize that malpractices have been widespread in the past, but we are confident that the regulatory authority given the Board in this bill will prevent such practices in the future, and we, therefore, have no hesitancy in recommending that the bill as amended be approved." S. Rep. No. 691, 87th Cong., 1st Sess., 7 (1961).

Upon passage of the Freight Forwarder Law of 1961, the Commission necessarily revoked the Board's prior published regulations and began a new rule-making proceeding which resulted in the issuance of final regulations promulgated as its General Order 4, 28 Fed. Reg. 4300. In formulating those regulations, the Commission took into account the statutory objectives, the history of the industry's problems, and numerous comments received from interested parties.

On May 6, 1966 the Commission published a Notice of Proposed Rule-Making, 31 Fed. Reg. 6792-93, and invited comments from interested persons. The purpose of the proceeding was to consider proposed amendments to paragraphs (a) of section 510.22; (a), (f) and (j) of section 510.23; and (a) and (f) of section 510.24 of General Order 4. Comments were submitted by carriers, shipping conferences, forwarders and forwarders associations. Replies to the comments were filed by the Commission's Hearing Counsel and several persons filed replies to these comments.

After oral argument, the Commission promulgated amendments to sections 510.22(a); 510.23(a), (f) and (j); and 510.24(a) and (f). The rules were

promulgated pursuant to section 4 of the Administrative Procedure Act, 5 U.S.C. §1003[2/] and sections 18(b), 43 and 44 of the Shipping Act, 46 U.S.C. §§817(b), 841a and 841b.

The New York Foreign Freight Forwarders and Brokers Association (Petitioner) petitioned the Commission for reconsideration and applied for postponement of the effective date of the rules. On November 18, 1966 the Commission postponed until further order the effective date of sections 510.22(a), 510.23(f), 510.24(a) and 510.24(f).

The postponed amendments, which are the subject of this petition for review, provided that (1) an ocean carrier must specify in its published tariffs the rates for forwarding services it is willing to perform on cargo carried under its own bills of lading, and must also specify those services which it will furnish free of charge (section 510.22(a)); (2) forwarders must pay over to carriers or their agents within seven days after receipt thereof or five days after departure of the vessel, whichever is later, all monies advanced to the forwarders by their principals for freight and transportation charges (section 510.23(f)); (3) carriers may not pay any compensation or payment of any kind in connection with shipments when the forwarder's name appears as shipper or agent for an undisclosed principal (section 510.24(a)); and (4) carriers must file with the Commission tariffs showing the rate or rates of brokerage compensation to be paid forwarders (section 510.24(f)).

2/ Reenacted without substantial change by P.L. 89-554, 80 Stat. 381, 5 U.S.C. §551, et seq. (Sept. 6, 1966).

The National Customs Brokers and Forwarders Association of America, Inc. (Intervenor in this proceeding) petitioned the Commission for a reopening and reconsideration and for a stay pending the Commission's decision on its pleading. Numerous persons submitted replies to the petition for reconsideration. The petitions for reconsideration were denied on March 2, 1967 and an effective date was promulgated for the four amendments which had been postponed.

A petition for review of the amendments to rules 510.22(a), 510.23(f), and 510.24(a) and (f) was filed in this court on March 27, 1967. Petitioner also moved in this court for a temporary stay and for an interlocutory injunction suspending and restraining the Commission from implementing on April 5, 1967 the four challenged amendments to its General Order 4. On March 30, 1967 the Commission, on its own motion, stayed the effective date of the amendments until April 20, 1967 to enable this court to first consider and rule on the motion for the temporary stay and interlocutory injunction. Numerous persons were allowed to intervene in this proceeding.[3/]

This court on April 14, 1967 stayed the effectiveness of the Commission's order as it amended 46 C.F.R. 510.22(a) pending final disposition by this court of the petition for review. Petitioner's motion to stay the implementation of sections 510.23(f), 510.24(a) and 510.24(f) was denied and they became effective on April 20, 1967.

The text of the amendments is set forth in the Joint Appendix. (JA 19-22).

3/ National Customs Brokers and Forwarders Association of America, Inc., Associated Latin American Freight Conferences, River Plate & Brazil Conferences, North Atlantic Baltic Freight Conference, North Atlantic Continental Freight Conference, North Atlantic French Atlantic Freight Conference, North Atlantic United Kingdom Freight Conference, North Atlantic Mediterranean Freight Conference and Far East Conference.

SUMMARY OF ARGUMENT

I. The Commission is authorized, and indeed required, to promulgate reasonable rules governing the freight forwarding industry. Section 44 of the Shipping Act, was enacted to remedy the long-standing malpractices prevelant in the industry and the Commission was instructed to "prescribe reasonable rules and regulations to be observed by independent ocean freight forwarders."

Congress intended that the Commission's rule-making authority be broad and petitioner is collaterally estopped from arguing that the scope of the Commission's regulatory power is limited to situations in which a specific abuse or violation of the Act has been unearthed. The same petitioner unsuccessfully argued the same position in another review of the Commission's rule-making authority over freight forwarders in the United States Court of Appeals for the Second Circuit.

Section 43 of the Act authorizes the Commission to "make such rules and regulations as may be necessary to carry out the provisions of this Act." The rules under review here were promulgated to carry out the provisions of the Freight Forwarders Law, enacted as section 44 of the Act. Therefore, section 43 also authorizes the promulgation of the forwarder rules now under attack.

II. The amendments to the four rules are reasonable exercises of the Commission's rule-making authority. Petitioner has failed to show their unreasonableness and overcome their presumptive validity.

A. Rule 510.22(a) is reasonable since it insures equality of treatment of shippers. Henceforth, whatever forwarding services carriers wish to furnish to the shipper will be available to all at the tariff rate. The Commission took no position on the level of compensation to be paid for the carrier's forwarding services. Rather, it simply aimed at insuring against rebates to selected shippers, a practice already found inimical to the stability of the shipping industry.

Furthermore, carriers are not subject to the licensing requirements of section 44, since they are not in the business of forwarding as contemplated in that section. They are therefore free from the restrictions imposed upon licensees.

B. Rule 510.23(f) is reasonable on its face since it provides for a reasonable time within which forwarders must turn over to the carrier freight monies advanced to the forwarder by the shipper. The amendment introduces a degree of certainty into the shipper-forwarder-carrier financial relationship. Petitioner has failed to show unreasonableness by merely asserting that the forwarders would incur a financial hardship under the amended rule.

C. Rule 510.24(a) is reasonable because it aids the Commission in carrying out its statutory obligations to prevent rebates and supervise the dual-rate agreements which it has approved. Again, petitioner has not overcome the demonstrated reasonableness. Nowhere has it documented how the greater disclosure of shippers' names, inherent in the rule, will deprive forwarders of brokerage. Moreover, loss of brokerage is not enough to render the rule unreasonable.

D. Finally, rule 510.24(f) is also reasonable because it helps insure the reasonableness of brokerage payments. Congress indicated that excessive brokerage payments are evil and charged the Commission with eliminating the practice. The rule aids the Commission in its duty by requiring carriers to file in their tariffs the brokerage they are willing to pay. The Commission has not attempted, however, to regulate the level of brokerage, so long as it is reasonable.

ARGUMENT

I. THE COMMISSION IS AUTHORIZED TO PROMULGATE REASONABLE RULES FOR THE CONDUCT OF THE FREIGHT FORWARDING INDUSTRY.

The Commission is authorized to prescribe reasonable rules governing freight forwarder operations, by both sections 44 and 43 of the Shipping Act, 46 U.S.C. §§841b(c), 841a, and it is not necessary that the agency initially find a violation of the Act as petitioner contends. Section 44, 46 U.S.C. §841b deals specifically with freight forwarders and states:

> "(c) The Commission shall prescribe reasonable rules and regulations to be observed by independent ocean freight forwarders. . . ." 46 U.S.C. §841b(c).

Section 43 states:

> "The Commission shall make such rules and regulations as may be necessary to carry out the provisions of this Act." 46 U.S.C. §841a.

Section 44 is the product of a long and thorough examination of the ocean freight forwarder industry which culminated with the Freight Forwarder Law of 1961. The statute established licensing of independent ocean freight forwarders as the basic regulatory tool, and the Commission was given broad discretion in implementing its provisions. As the Senate Commerce Committee stated:

> "We recognize that malpractices have been widespread in the past, but we are confident that the regulatory authority given the Board in this bill will prevent such practices in the future and we therefore have no hesitancy in recommending that the bill as amended be approved." Senate Report No. 691, 87th Cong., 1st Sess, 7 (1961).

The language of section 44(c) demands only that the rules and regulations be reasonable. Had Congress wished to require a finding of a violation of the Act to validate the forwarder rules, it could easily have done so. Just as

section 44(b) permits the Commission to deny a license application if it is not satisfied that the applicant's business "is, or will be, consistent with the national maritime policies declared in the Merchant Marine Act, 1936," section 44(c) envisions positive business standards to be met as conditions of obtaining a forwarder's license. The rules and regulations authorized to be promulgated under section 44(c) are not only to remedy specific past evils detected by the Commission, but also to prevent future abuses which might run afoul of the Act and its philosophy. Such is the nature of rule-making. Its thrust is forward and general, not particular and rooted in violations of the Act as in adjudication. Philadelphia Co. v. Securities and Exchange Commission, 84 U.S. App. D.C. 73, 175 F.2d 808, 816 (D.C. Cir. 1948).

In American Trucking Ass'n. v. United States, 344 U.S. 298 (1953), an Interstate Commerce Commission rule was challenged on the ground that the Motor Carrier Act, 49 U.S.C. §301 et seq. did not grant to the ICC the specific power to control leases and that therefore the agency could not issue rules prohibiting them. The Court discussed the scope of regulatory statutes and stated:

> "All urge upon us the fact that nowhere in the Act is there an express delegation of power to control regulate or affect leasing practices, and it is further insisted that in each separate provision of the Act granting regulatory authority there is no direct implication of such power. Our function, however, does not stop with a section-by-section search for the phrase 'regulation of leasing practices' among the literal words of the statutory provisions. As a matter of principle, we might agree with appellants' contentions if we thought it a reasonable canon of interpretation that the draftsmen of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of every evil sought to be corrected. But no great acquaintance with practical affairs is required to know that such prescience, either in fact or in the minds of Congress, does not exist." 344 U.S. at 309-10 (footnote omitted).

Petitioner raised the same argument as to the scope of the Commission's rule-making power over freight forwarders in New York Foreign Freight Forwarders and Brokers Association v. Federal Maritime Commission. 337 F.2d 289 (2d Cir. 1964), cert. denied, 380 U.S. 910 (1965). There petitioner also challenged General Order 4 regulations implementing the Freight Forwarder Law of 1961. In discussing the scope of its review the court noted that:

> "The New York Association maintains that the Maritime Commission's rule-making authority is limited to correcting practices found to violate the regulatory provisions of the 1916 Shipping Act. If, according to this view, a practice sought to be regulated is not contrary to a substantive provision of the 1916 Act, then, it is urged, the regulation is invalid. We do not agree with this restrictive view of the agency's powers."
>
> * * *
>
> "Our limited scope of review, established by judicial decisions and the A.P.A., is based on a realistic view of the legislative process. Congressional legislation does not undertake to deal with every specific evil for some are unforeseeable; instead Congress often creates an administrative agency to allow application of experts' familiarity with the problems involved." 337 F.2d at 294-95.

Petitioner is collaterally estopped from raising the same argument here:

> "The essence of collateral estoppel by judgment is that some question or fact in dispute has been judicially and finally determined by a court of competent jurisdiction between the same parties or their privies. Thus the principle of such an estoppel may be stated as follows: Where there is a second action between parties, or their privies, who are bound by a judgment rendered in a prior suit, but the second action involves a different claim, cause, or demand, the judgment in the first suit operates as a collateral estoppel as to but only as to, those matters or points which were in issue or controverted and upon the determination of which the initial judgment necessarily depended." 1b Moore, Federal Practice, 3777 (1965) (footnotes omitted).

Section 43, (46 U.S.C. §841a) also authorizes the Commission to promulgate the amendments to the freight forwarders rules. The section was enacted as part of the dual rate legislation,[4/] but the legislative intent was to permit the Commission to utilize its expertise to solve industry problems even when not related to dual contracts or when not based upon a finding of a violation of the Act. The Senate Commerce Committee, in discussing the "broad rule making mandate" of section 43, specifically referred to at least one matter not related to dual rate agreements to which section 43 could be applied. S. Rep. No. 860, 87th Cong., 1st Sess., 15 (1961). In fact the Commerce Committee consciously broadened section 43 to permit the Commission to promulgate rules and regulations to carry out the provisions of the entire Act, not just the provisions of sections 14b, 15, 18(b), 19(b), 20 and 21 as set forth in the House version. The scope of the rule-making statute was enlarged at the request of the Commission which sought an expression of general rule-making authority, covering all provisions of the Act. Id. at 20. The Committee even suggested three matters unrelated to any violation of the Act which it felt the Commission should resolve through its broad section 43 rule-making power. Id. at 14-15.

The expansive scope of the Commission's rule-making power is supported by this court's recent decision in Pacific Coast European Conference v. Federal Maritime Commission, __U.S. App. D.C.__, __F.2d__ (D.C. Cir., decided March 31, 1967). As the court noted:

4/ 75 Stat. 766, enacted as Pub. L. 87-346. The dual rate legislation dealt with a unique contract arrangement common among carriers or conferences of such carriers "which is available to all shippers and consignees on equal terms and conditions, which provides lower rates to a shipper or consignee who agrees to give all or any fixed portion of his patronage to such carrier or conference of carriers. . . ." 46 U.S.C. 813a.

"The legislative history is clear that Congress intended to clothe the Commission with a broad authority in this regard, going well beyond what it had possessed before. See, e.g., Alcoa Steamship Co. v. FMC, 121 U.S. App. D.C. 144, 148, 348 F.2d 756, 760 n.27 (1965)." Slip Opinion, p. 3-4, footnote 2.

* * *

"But the essence of rule-making is generality of application and General Order 9 was not devised with this Conference alone in mind. Moreover, the Commission in rule-making is not confined to the redress of demonstrated evils as distinct from the prevention of potential ones." Slip Opinion, p. 9. (emphasis supplied).

Rules and regulations promulgated under section 43 are authorized if they are necessary to carry out the provisions of the Act. The Act provides for regulation of freight forwarders in section 44. A reasonable exercise of rule-making power for this purpose is therefore within the scope of section 43.

The nature of rule-making language, the history of sections 44 and 43, and the judicial construction of the statutes all make clear that the Commission is authorized to promulgate reasonable rules relating to freight forwarding, even absent a showing of a violation of the Act.

II. THE AMENDMENTS TO THE COMMISSION'S GENERAL ORDER 4 ARE REASONABLE AND SHOULD BE UPHELD.

A. The Amendment to Rule 510.22(a) Insures Equality of Treatment Among Shippers and Therefore is Reasonable.

Rule 510.22(a) was amended to state:

"An oceangoing common carrier may perform freight forwarding services without a license only with respect to cargo carried under its own bill of lading, in which case the charge(s) for each forwarding service the carrier is willing to perform shall be assessed, in accordance with the carrier's published tariffs on file with the Commission. Any forwarding service on cargo carried under its own bill of lading which the carrier is willing to perform free of charge, including presentation of executed Shipper's Export Declarations to customs authorities, shall be specified in its tariffs." (JA 19)

The "sole purpose of the amendment is to ensure equal treatment of shippers." (JA 12). Indeed, the entire history of freight forwarder regulation is concerned with inequalities of treatment accorded shippers. In its general investigation into practices of ocean freight forwarders, Docket No. 765, the Federal Maritime Board observed that:

> "The record compels the conclusion that, in the assessment or charges by forwarders to their shippers, the practices of discrimination, preference, and prejudice is the rule rather than the exception. The charges vary from shipper to shipper for identical services. . . ." Investigation of Practices, Operations, Actions, and Agreements of Ocean Freight Forwarders and Related Matters. 6 F.M.B. at 359.

On its face, 510.22(a) clearly insures equal treatment of shippers by the carrier. The Commission took no stand on the level of compensation to be paid by shippers for forwarding services which the carriers choose to provide, but merely required that the forwarding charges be published in tariffs in order to inform all shippers, large and small, of the charges which they must pay for the carriers' forwarding services. In the Commission's language:

> "Thus, the only alteration we will make in existing practice is to require publication of the particular practice in the appropriate tariff so as to insure that all shippers are apprised of the services offered and may take advantage of them." (JA 13).

The salutary effect of 510.22(a) is apparent. Those carriers who wish to attract cargo without having to pay brokerage to a freight forwarder are effectively prohibited from luring large shippers by providing services not otherwise available to other shippers at the same rates. Henceforth, shippers will know which forwarding services the carrier is willing to perform, thus preventing the sort of preferential carrier practices unearthed in Foreign Freight Forwarders Investigation, supra.

In that case, the Board concluded:

> "That the performance by common carriers subject to the Act of forwarding services free of charge or at non-compensatory charges on shipments transported by such carriers constitutes a violation of section 16 Second of the Act." 6 F.M.B. at 367.

However, the context of the Board's conclusion makes clear that the Board did not find free carrier forwarding services violative of the Shipping Act as a matter of law.[5/] Its conclusion, rather, was based on a finding that:

> "The record also supports the conclusion that some carriers in the foreign export trades, though not identified of record, engage regularly in the performance of forwarding services for shippers, and for some forwarders, free of charge. As previously indicated, such practices constitute direct rebates." 6 F.M.B. 360-61. (emphasis supplied).

The carrier practice with which the Board was concerned in the earlier docket was the granting of rebates to certain shippers and forwarders, not the level of the charges themselves. The rebates, of course, violated section 16 of the Act,[6/] 6 F.M.B. at 351, and were the same evil 510.22(a) seeks to eliminate - i.e. favoring one shipper or forwarder over another. The perniciousness of rebating is discussed at length in the Freight Forwarder Investigation, see 6 F.M.B. at 360, and those illegal rebating practices are no less offensive when undertaken by the carrier rather than the forwarder.

5/ Carriers have not entered the "forwarding business" and indicate no desire to do so. Rather, their forwarding activities generally are confined to filing export declarations for validation. (JA 12). (A more detailed explanation of the carriers' interest in performing forwarding services appears in the joint brief filed on behalf of the shipping conferences.) Consequently, the Commission has never considered whether or not the carriers' forwarding charges would have to be compensatory if the carriers were in the "forwarding business."

6/ Section 16, 46 U.S.C. §815 provides: ". . . Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means."

> "It necessarily follows, therefore, that if brokerage payments providing the sole compensation for the performance of forwarding functions constitute an indirect rebate to the shipper in violation of section 16 of the Act, the performance of such functions by the carriers for shippers free or at non-compensatory charges would result in direct rebates likewise in violation of the statute. Cf. Propriety of Operating Practices—New York Warehousing, 198 I.C.C. 134, 216 I.C.C. 291." 6 F.M.B. at 357.

Since the furnishing of free forwarding services by the carrier is not per se illegal or improper, the amendment to rule 510.22(a) is a reasonable exercise of the Commission's rule-making power.

Moreover, the Commission's amendment is presumptively valid, as are its other freight forwarder rules. New York Foreign Freight Forwarders and Brokers Association v. Federal Maritime Commission, 337 F.2d at 295, quoting United States v. Obermeir, 186 F.2d 243 (2d Cir. 1950), cert. denied, 340 U.S. 951 (1951). Petitioners do not overcome the validity of 510.22(a) by arguing that their industry will suffer so severely as to render the rule illegal. The independent freight forwarders have no right to be free from competition from the carriers, if the carriers decide to perform certain forwarding services. While freight forwarders fulfill an important function in the shipping industry, they do so only because shippers are generally not competent to perform the intricate forwarding tasks. If some of those same services are available from a carrier, the importance of forwarders is necessarily diminished. "We believe that the primary value of the forwarding industry should be measured by the needs of the shippers which utilize its services." H.R. Rep. No. 2939, 84th Cong., 2d Sess. 52 (1956).

It is equally clear that intervenor, National Customs Brokers and Forwarders, is incorrect in its assertion that carriers who choose to perform forwarding

services are subject to the licensing requirements of section 44 of the Act, 46 U.S.C. §841b. The licensing requirements enacted in the 1961 Freight Forwarders Law are aimed specifically at those malpractices found to exist where the forwarders act in a dual capacity by holding "themselves out as representatives of both shipper and carrier with regard to the same export shipment." H.R. Rep. 2939, 84th Cong., 2d Sess. 4 (1956); H.R. Rep. No. 798, 86th Cong., 1st Sess. 2 (1959). He is essentially a "go-between" for carrier and shipper. United States v. American Union Transport, 327 U.S. 437, 450 (1946).

The House Report found three primary types of practices which deserved the particular attention of Congress. 7/ Each example displayed an inextricable relationship between the forwarding functions performed for the shipper and the receipt of brokerage from the carrier relating to the same cargo. H.R. Rep. No. 2939, 84th Cong., 2d Sess. 53-55 (1956). However, here no brokerage-forwarding fee relationship exists since the carrier itself, rather than the forwarder, performs forwarding services for a shipper.

The intention of the licensing requirements is to insure competent forwarders qualified to act in the fiduciary relationship inherent in a legitimate freight forwarding industry. H.R. Rep. No. 1096, 87th Cong., 1st Sess. 3, (1961); H.R. Rep. No. 798, 86th Cong., 1st Sess., 2 (1959). Licensing is required only as to those "carrying on the business of forwarding" which is defined as "the dispatching of shipments by any person on behalf of others, by ocean-going common carriers. . . ." 46 U.S.C. §801. The definition implies detachment of

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7/ They are "1. Preferential and discriminatory practices. 2. Collection of unearned brokerage fees. 3. Organization of dummy forwarder concerns." H.R. Rep. No. 2939, 84th Cong., 2d Sess., 53 (1956).

the person whose business is forwarding from the ocean-going carrier. Licensing simply was never envisioned for carriers.

In summary, the level of compensation to be paid to the carrier for forwarding services has never been prescribed by the Commission. Rather, the Commission seeks to insure against rebating or other similar abuses of the Shipping Act provisions. Moreover, carriers may perform forwarding services without a license. Rule 510.22(a) is therefore a reasonable and indeed beneficial exercise of statutory rule-making authority.

B. The Amendment to Rule 510.23(f) Requiring the Forwarders to Pay-Over to the Common Carriers Within Specified Time All Freight Monies Received From the Shipper is Reasonable Because it Adds an Element of Certainty to Forwarding Operations.

The amendment to Rule 510.23(f) states:

> "(f) Each licensee shall promptly pay over to the ocean-going common carrier or its agent within seven (7) days after the receipt thereof, excluding Saturdays, Sundays and legal holidays, or within five (5) days after the departure of the vessel from each port of loading, excluding Saturdays, Sundays and legal holidays, whichever is later, all sums advanced the licensee by its principal for freight and transportation charges, and shall disburse to other person(s) when due all sums advanced by its principal for the payment of any charges, debts or obligations in connection with the forwarding transaction, and shall promptly account to its principal for overpayments, adjustments of charges, reductions in rates, insurance refunds, insurance money paid to the forwarder as the result of claims, proceeds of c.o.d. shipments, drafts, letters of credit and any other sums due such principal." (JA 20-21)

Shippers often do not know which carrier will transport their goods at the time they entrust the goods to a forwarder. Consequently, the shippers often submit their freight monies to the forwarder to be transmitted to the appropriate carrier when the cargo is placed. Rule 510.23(f)

simply changes the requirement that the forwarder pay over monies received from the shipper "promptly" to the more exact obligation to pay-over the freight monies within seven days of receipt or five days after the ship carrying the cargo has sailed, whichever is later. The amendment introduces a degree of certainty into shipping financing procedures and is reasonable on its face.

Petitioner asks this court to invalidate the rule on the speculative assertion that it will cause a "significant hardship." But no undue hardship is apparent on the face of the rule and petitioner certainly does not tell this court what or how serious the burden will be. On the contrary, as the Commission indicated in its opinion, the forwarders may still take up to five business days after sailing before paying over the freight monies and therefore can still issue but one check in most cases. Moreover, even if hardship to brokers had been shown, that alone is not sufficient to render the amendment an arbitrary or unreasonable exercise of rulemaking. After all, the freight or transportation monies, which are the subject of the rule, belong to the carrier, not the forwarder who merely holds the monies as a fiduciary after the ship has sailed.

C. The Amendment to Rule 510.24(a) Requiring Disclosure of the True Shippers' Names on Bills of Lading Is Also A Reasonable Exercise of The Commission Rule-Making Power Since It Prevents Rebates Made Through Forwarders to Undisclosed Principals and Aids In The Supervision of Dual Rate Contracts.

The amendment to rule 510.24(a) provides:

> "(a) No oceangoing common carrier shall pay to a licensee, and no licensee shall charge or receive from any such carrier, either directly or indirectly, any compensation or payment of any kind whatsoever, whether called 'brokerage', 'commission', 'fee', or by any other name, in connection with any cargo or shipment wherein the licensee's name appears on the ocean bill of lading as shipper or as agent for an undisclosed principal." (JA 21-22).

Prior to the 510.24(a) amendment, a forwarder could receive brokerage for goods shipped in his own name or as agent for an undisclosed principal as long as the identity of the true shipper appeared on the "line copy" of the bill of lading.[8/] The carrier could then properly pay a brokerage fee to the forwarder without fear of making a rebate since a forwarder may not receive brokerage from a carrier unless he has no beneficial interest in the forwarded goods. Disclosure of the true shipper on the "line copy" of the bill and the export declaration also was helpful in both industry and Commission supervision of dual rate contracts, since an examination of the line copy would reveal whether or not the true shipper was violating his contract by shipping by a carrier or conference which was not a signatory to the contract.

In promulgating 510.24(a), however, the Commission found that the disclosure requirements of the "line copy" rule were inadequate. Formerly, in order to ascertain whether or not carriers were rebating to shippers, "the Commission could determine whether or not an unlawful rebate has been paid and received only after an individual search" of line copies in the carriers' possession. (JA 16). The amendment was promulgated to remedy this difficulty. The Commission also felt, in promulgating the amendment to 510.24(a), that more adequate disclosure of the true shipper's identity "would lend a measure of integrity to lawful dual rate contracts"which were subject to supervision and approval of the Commission. Ibid. Again, broader disclosure of the shipper's true identity will facilitate industry self-policing practices and help the Commission to supervise dual rate agreements.

8/ The bill of lading contains a number of copies which find their way into the stream of commerce in connection with the ocean transportation. The "line copy" is retained by the carrier and generally is not circulated to others.

The Commission has a statutory obligation under sections 43 and 44(c) of the Act, (46 U.S.C. §§841a and 841b(c)) to supervise freight forwarding and prevent rebates. Likewise, it has an obligation under section 14b, (46 U.S.C. §813a) to supervise dual rate contracts.[9/] In the exercise of its discretion and utilizing its expertise, the Commission has decided that greater disclosure would aid both the agency and industry in eliminating potential violations of the Act. Under the amendment, all copies of the bill of lading will name the true shipper if the forwarder wants his brokerage. It is certainly in the public interest to have sufficient disclosure to prevent rebates and violations of the dual rate contracts which depend on Commission approval for their validity. The amendment to 510.24(a) is therefore clearly reasonable.

Nor have the forwarders overcome the presumption of the amendment's validity. Petitioners argue that compliance will result in a denial of brokerage compensation even though there are lawful commercial reasons for adhering to the more restrictive disclosure requirements. In the first place, the Commission majority noted that: "In Docket No. 973, as here, contentions were raised by forwarders that valid business reasons exist for not disclosing the name of the actual shipper. None were identified or documented." (JA 16). Second, petitioners have yet to identify and document valid business reasons, but merely suggest hypothetical situations in which the amendment might deprive them of brokerage revenue. Third, even if it were shown that some brokerage would be lost to forwarders by complying with the true shipper's

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9/ Section 14b states: "The Commission shall withdraw permission which it has granted under the authority contained in this section for the use of any contract if it finds, after notice and hearing, that the use of such contract is detrimental to the commerce of the United States or contrary to the public interest, or is unjustly discriminatory or unfair as between shippers, exporters, importers or ports, or between exporters from the United States and their foreign competitors."

request that the forwarder appear on the bill of lading as shipper or "agent," this does not itself render the Commission's rule invalid. A reasonable basis for the amendment was elaborated by the Commission and there is no showing that it is either arbitrary or capricious.

Moreover, it simply is not demonstrated how forwarders will lose brokerage. Forwarders will only suffer loss if they comply with instructions that they appear as shipper or agent. But since the amendment applies to all licensees, it is doubtful that the secretive shipper will be able to convince any forwarder that he should appear as shipper or agent. The shipper who wishes to remain undisclosed will either have to perform his own forwarding (an uncommon practice), compensate the forwarder who appears as shipper or agent for lost brokerage, or find a forwarder who is willing to provide services without brokerage.

D. <u>The Commission Acted Reasonably in Promulgating The Amendment to Rule 510.24(f) Since the Rule Insures the Reasonableness of Brokerage Payments</u>.

The amendment to Rule 510.24(f) states:

> "(f) An oceangoing common carrier may compensate a licensee to the extent of the value rendered such carrier in connection with any shipment forwarded on behalf of others when, and only when, such carrier is in possession of a certification in the form prescribed in paragraph (e) of this section. Every tariff filed pursuant to section 18(b)(1), Shipping Act, 1916, shall specify the rate or rates of compensation to be paid licensed forwarders certifying in accordance with rule 510.24(e) of this part, and the conditions of payment." (JA 22).

The Commission went to considerable length in explaining the basis for the amendment after reciting the objections raised by parties to the rule-making. The Commission said:

> "The amendment will allow us to keep ourselves informed of any possible malpractices with respect to payment of compensation to forwarders, including the practice of paying excessive brokerage.

> No one is compelled under this amendment to pay brokerage for services not performed nor is it designed to defeat attempts by carriers to compete with one another by paying different levels of brokerage or varying such levels according to the services performed. All the Commission desires is that the levels of compensation be ascertainable and it be in a position to insure that such levels not be unjustly discriminatory, excessive, or otherwise unlawful." (JA 18).

In support of its position the Commission discussed the legislative history of the 1961 Freight Forwarders Law. It had been proposed that a maximum brokerage rate of five percent be specified in the legislation. However, the House Committee concluded that "the 5-percent maximum was deleted from the bill as hereby reported with the understanding that the Federal Maritime Commission would oversee the reasonableness of brokerage in light of services rendered." H.R. Rep. No. 1096, 87th Cong., 1st Sess., 3 (1961) (emphasis supplied). In Representative Mailliard's view:

> "I would like to either set a lower rate, which would be a customary rate, and allow the Board to increase it if the circumstances justify, or, if you wish, set up a higher rate, but permit the Board to establish what is fair and reasonable, as they do in many other instances.
>
> I think that somewhere you have got to have either a fairly low rate, with the authority to break through it for good and sufficient reason, or else a higher maximum, but with some supervision as to whether it is fair and reasonable." Hearings on H.R. 2488, 87th Cong., 1st Sess., 95 (1961) (emphasis supplied).

And in discussing the evil of excessive brokerage, Representative Mailliard commented that:

> ". . . it does seem to me that if we put no limitation on, it is almost a direct invitation to some of the in-and-outers and non-conference people to go in and try to buy cargo."
>
> * * *
>
> And I think if we are going to try to clean this thing up, we have got to do something to prevent that kind of thing." Ibid.

The amendment to 510.24(f) makes no attempt to regulate the level of brokerage carriers may pay to forwarders, thereby thwarting free enterprise. On the contrary, the Commission specifically said that the rule is not "designed to defeat attempts by carriers to compete with one another by paying different levels of brokerage. . . ." (JA 18). Rather, the amendment is another reasonable step undertaken by the Commission to obtain sufficient disclosure of brokerage-forwarding practices in order to prevent excessive brokerage. "Payment of excessive brokerage in our opinion is a pernicious practice, inimical to the best interest of shipping in our foreign trade and oppressive to the shipper who must eventually bear the cost." Grace Line, Inc. v. Skips A/S Viking Line, 7 F.M.C. 432, 451 (1962).

Petitioner also seeks to overcome the obvious reasonableness and prima facie validity of the rule by an assertion of overriding Congressional intent to insure elasticity in the shipping industry. (Pet. Br. 48). The filing requirements of 510.24(f), it is argued, would have a serious impact upon the independent carrier since these carriers compete for cargo on a negotiated brokerage basis. However, petitioners have no standing to complain on behalf of the independent carriers, none of whom have sought to present reasons for overturning a patently reasonable rule.

Finally, the tariff filing requirements of section 18b (46 U.S.C. 817b) are not, as petitioner alleges, the exclusive means by which the Commission may require the filing of rates and charges with it. This court has recently held that the Commission may, in the exercise of its general rule-making authority, require the filing of rates and charges for terminal services so that the Commission will be kept fully informed of terminal practices subject to section 17 of the Act. The Alabama Great Southern R.R., Co. v. Federal Maritime Commission

__U.S. App. D.C.__, __F.2d__ (D.C. Cir., decided April 17, 1967, Slip Opinion 5-6).

CONCLUSION

For the foregoing reasons, the order under review should be affirmed.

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